DOCKET

No. 12-1497

Title:	Kellogg Brown & Root Services, Inc., et al., Petitioners
	v.
	United States, ex rel. Benjamin Carter
Docketed:	June 26, 2013
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(12-1011)
Decision Date:	March 18, 2013
Rehearing Denied:	April 23, 2013

Questions Presented

--Date--	------Proceedings and Orders----------
Jun 24 2013	Petition for a writ of certiorari filed. (Response due July 26, 2013)
Jul 16 2013	Order extending time to file response to petition to and including August 26, 2013.
Jul 26 2013	Motion for leave to file amicus brief filed by National Defense Industrial Association.
Jul 26 2013	Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al.
Aug 26 2013	Brief of respondent United States, ex rel. Benjamin Carter in opposition filed.
Sep 10 2013	Reply of petitioners Kellogg Brown & Root Services, Inc., et al. filed.
Sep 11 2013	DISTRIBUTED for Conference of September 30, 2013.
Sep 26 2013	Supplemental brief of petitioners Kellogg Brown & Root Services, Inc., et al. filed. (Distributed)
Oct 7 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 27 2014	Brief amicus curiae of United States filed.
Jun 10 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 10 2014	Supplemental brief of petitioners Kellogg Brown & Root Services, Inc., et al. filed. (Distributed)
Jun 23 2014	Supplemental brief of petitioners regarding intervening decision filed. (Distributed)
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Motion for leave to file amici brief filed by Chamber of Commerce of the United States of America, et al. GRANTED.
Jul 1 2014	Motion for leave to file amicus brief filed by National Defense Industrial Association GRANTED.
Jul 1 2014	Petition GRANTED.
Jul 18 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to

	and including August 29, 2014.
Jul 18 2014	The time to file respondent's brief on the merits is extended to and including October 14, 2014.
Aug 26 2014	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for the petitioners.
Aug 27 2014	Consent to the filing of amicus curiae briefs in support of either party or neither party from counsel for respondent.
Aug 29 2014	Joint appendix filed. (Statement of costs filed.)
Aug 29 2014	Brief of petitioners Kellogg Brown & Root Services, Inc., et al. filed.
Aug 29 2014	Motion to file Volume II of the joint appendix under seal filed by petitioners Kellogg Brown & Root Services, Inc., et al.
Sep 4 2014	Brief amicus curiae of New England Legal Foundation filed.
Sep 5 2014	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Sep 5 2014	Brief amicus curiae of Verizon filed.
Sep 5 2014	Brief amici curiae of The National Defense Industrial Association, et al., filed.
Sep 10 2014	Motion DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	Motion to file Volume II of the joint appendix under seal GRANTED.
Oct 14 2014	Brief of respondent United States, ex rel. Benjamin Carter filed.
Oct 21 2014	Brief amicus curiae of the United States filed.
Oct 21 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 21 2014	Brief amicus curiae of National Whistleblower Center filed.
Oct 21 2014	Brief amicus curiae of Taxpayers Against Fraud Education Fund filed.
Nov 10 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 13 2014	Reply of petitioners Kellogg Brown & Root Services, Inc., et al. filed.
Nov 21 2014	SET FOR ARGUMENT ON Tuesday, January 13, 2015
Dec 2 2014	CIRCULATED.
Dec 2 2014	Record requested from U.S.C.A. 4th Circuit.
Dec 12 2014	Record received from U.S.C.A. 4th Circuit. The record is electronic and located on PACER, with the exception of 1 Box (SEALED).
Jan 13 2015	Argued. For petitioners: John P. Elwood, Washington, D. C. For respondent: David S. Stone, Short Hills, N. J.; and Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
May 26 2015	Adjudged to be REVERSED IN PART, AFFIRMED IN PART, and case REMANDED. Alito, J., delivered the opinion for a unanimous Court.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

12-1497

Supreme Court, U.S.
FILED
JUN 24 2013
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SUPREME COURT, U.S.

No.

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL, PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Wartime Suspension of Limitations Act—a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," 18 U.S.C. § 3287, and which this Court has instructed must be "narrowly construed" in favor of repose—applies to claims of *civil* fraud brought by private relators, and is triggered without a formal declaration of war, in a manner that leads to indefinite tolling.

2. Whether, contrary to the conclusion of numerous courts, the False Claims Act's so-called "first-to-file" bar, 31 U.S.C. § 3730(b)(5)—which creates a race to the courthouse to reward relators who promptly disclose fraud against the government, while prohibiting repetitive, parasitic claims—functions as a "one-case-at-a-time" rule allowing an infinite series of duplicative claims so long as no prior claim is pending at the time of filing.

PARTIES TO THE PROCEEDINGS

Petitioners Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc., were defendants-appellees below. Respondent, relator Benjamin Carter, was the plaintiff-appellant below.

RULE 29.6 STATEMENT

Petitioner KBR, Inc. is a publicly held corporation that has no parent company, and is the ultimate parent of petitioner Kellogg Brown & Root Services, Inc. (KBR Holdings, LLC is an intermediate parent). KBR, Inc. is also the ultimate parent of petitioner Service Employees International, Inc. (KBR Group Holdings, Inc. and KBR Holdings LLC are intermediate parents). Petitioner Halliburton Company is a publicly held company that has no parent company. Other than as discussed above, no publicly held company owns 10% or more of the stock of any petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc. (collectively, "KBR") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the district court is under seal and unreported. The district court released an unsealed version of its opinion (App. 47a-76a) which is unreported but available at 2011 WL 6178878. The opinion of the court of appeals (App. 1a-46a) is reported at 710 F.3d 171. The order of the court of appeals denying the petition for rehearing en banc (App. 77a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2013. App. 1a. That court denied a petition for rehearing en banc on April 23, 2013. App. 77a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 78a-81a.

INTRODUCTION

Over a vigorous dissent, a divided panel of the Fourth Circuit has construed the Wartime Suspension of Limitations Act ("WSLA")—a *criminal code*

provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," 18 U.S.C. § 3287—to apply to *civil* fraud claims brought by private relators, although the provision is naturally read to apply to "crime[s]," see, *e.g.*, Black's Law Dictionary 1110 (8th ed. 2004) ("offense" means "[a] violation of the law; a crime"). Joining an acknowledged conflict among the courts on the issue, the Fourth Circuit held that "the United States is at war" for purposes of the WSLA even in the absence of a formal declaration, although the Act was written in the context of declared wars and despite Congress's expressed understanding that the pre-2008 Act did not apply to informal conflicts. And it did so contrary to this Court's direction that the WSLA must be "narrowly construed" in favor of repose, *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953), and its recent rejection of indefinite tolling in an opinion that emphasized that the False Claims Act ("FCA") contains an "*absolute* provision for repose" after 10 years. *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013) (emphasis added).

The enormous practical implications of the panel majority's decision are compounded by the court's equally mistaken construction of the False Claims Act's "first-to-file" bar, 31 U.S.C. § 3730(b)(5)—long understood to create a "race to the courthouse" that encourages plaintiffs to disclose fraud promptly so the government can investigate, while barring duplicative, parasitic claims. See, *e.g.*, *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 821 (9th Cir. 2005). Deepening a recognized conflict of authority, the court held that duplicative claims barred at the time they are filed can be revived and re-filed once related

prior claims are dismissed, or even once they are reduced to judgment. The panel thus transformed a prohibition on duplicative private claims into a "one-case-at-a-time" rule that, rather than fostering prompt fraud reporting, encourages private relators to delay filing claims to maximize their dollar value.

The panel decision not only exacerbates conflict and confusion among the lower courts on two recurring issues; as a practical matter, it has "dire effects" (App. 46a (Agee, J., concurring in part and dissenting in part)) for a host of industries, from defense contracting to health care to financial services. The Fourth Circuit, which supervises much of the nation's *qui tam* litigation and oversees numerous government agencies and contractors in the Washington, D.C. suburbs, has suspended the running of the statute of limitations for *every* claim of fraud against the government, from at least 2002 to some not-yet (and likely never-to-be) determined point in the future, while simultaneously eliminating any vestige of repose by construing the "first-to-file" bar to permit perpetual refiling of allegations long known to the government from prior suits. The facts of this case amply demonstrate what that means in practical terms: a company having to continue to defend years-old claims in which the government itself has *never* expressed interest, as a relator files and re-files a series of identical complaints raising duplicative allegations until, eventually, all prior related actions have been dismissed, settled, or reduced to judgment.

Put simply, for any entity that has done business with the government in any industry over the past ten years, the panel decision means that the statute of limitations has *not even begun to run* on any of the possible fraud claims that the government or a self-

interested relator might eventually choose to bring. And it will not expire until years after the President or Congress has formally terminated the conflicts in Iraq and Afghanistan—which has not happened yet and, as a practical and political matter, may never happen. Such a reading fundamentally affects the relationship between the government and those who do business with it. This Court's review is urgently needed.

STATEMENT OF THE CASE

1. a. The FCA imposes civil liability for knowingly presenting a false claim to the government for payment or approval. 31 U.S.C. § 3729(a). Its remedial scheme is "essentially punitive in nature," *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784-785 (2000), including treble damages and civil penalties, 31 U.S.C. § 3729. The statute authorizes a private "relator" to bring a *qui tam* civil action in the government's name. *Id.* § 3730(b)(1)

The FCA reflects a careful legislative compromise. While creating a significant financial incentive for relators to file suit, see 31 U.S.C. § 3730(d) (permitting awards of 15-30 percent of recovery plus fees and costs), Congress sought to "walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior" and repetitive suits. *United States ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003).

The "first-to-file" bar is essential to this compromise. It provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31

U.S.C. § 3730(b)(5). This serves the "twin goals of rejecting suits which the government is capable of pursuing itself"—for instance, where the government is already on notice of allegations of fraud—"while promoting those which the government is not equipped to bring on its own." *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011); accord *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009) (first-to-file bar "ensur[es] that the government has notice of the essential facts of an allegedly fraudulent scheme"); *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("Once the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied.").

b. The Wartime Suspension of Limitations Act is a World War I and II-era criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the federal government "[w]hen the United States is at war." 18 U.S.C. § 3287. The statute originated in the Nation's "gigantic and hastily organized procurement program[s]" during the two World Wars. *Bridges* v. *United States*, 346 U.S. 209, 216-219 (1953). It reflects Congress's recognition that "'[d]uring the World War[s] many frauds committed against the Government were not discovered until the 3-year statute of limitations [for federal crimes] had almost expired,'" in part because "'[t]he law-enforcement branch of the Government" was "busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.'" *Id.* at 219 n.18 (quoting S. Rep. No. 77-1544, at 1-2 (1942)).

2. KBR provided logistical services to the U.S. military in Iraq under a multi-year government con-

tract.[1] In 2005, relator Benjamin Carter worked for KBR as a water purification operator in Iraq. App. 3a. In 2006, Carter filed a *qui tam* complaint, which he amended in 2008, alleging FCA violations involving contaminated water ("*Carter 2008*"). The government reviewed Carter's complaint under seal pursuant to 31 U.S.C. § 3730(b)(2), but declined to intervene. After the district court dismissed the complaint, Carter amended again, this time alleging false billing for labor costs. App. 4a. Shortly before dispositive motions and trial, the government notified the parties about an earlier-filed *qui tam* action in California that alleged similar timekeeping fraud. Because the claims were related, the district court held that the first-to-file bar prohibited Carter's lawsuit. *Id.* at 4a-5a.

While Carter's appeal from that dismissal was pending, the California case was dismissed. Carter then refiled his 2008 complaint in a new docket ("*Carter 2010*"). The district court dismissed that version of the complaint in May 2011, holding that *Carter 2008* (then still pending on appeal to the Fourth Circuit) served as an independent first-to-file bar. App. 5a-6a. Carter tactically dismissed his *Carter 2008* appeal and, in June 2011, filed his complaint a third time ("*Carter 2011*"). *Ibid.* The government again declined to intervene.

The district court dismissed *Carter 2011* with prejudice. That court reasoned that yet another related *qui tam* action, *United States ex rel. Duprey* v. *Halliburton, Inc.*, No. 8:07-cv-1487 (D. Md.), was pending at the time *Carter 2011* was filed. And by

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[1] Petitioner Kellogg Brown & Root Services, Inc., was the contracting entity.

this time, nearly all of Carter's claims were barred by the FCA's six-year statute of limitations. App. 64a, 74a-75a.

As to tolling, the district court expressed skepticism that the WSLA applies at all to civil claims, given that the term "offense" denotes criminal liability. App. 68a. But the court found it unnecessary to reach that issue, observing that in all but one of the handful of cases applying the WSLA to civil claims (all from the 1950s), the United States was a party. *Id.* at 71a. The court analogized to circuit precedent holding that the FCA's tolling provision, 31 U.S.C. § 3731(b)(2), only applies when the United States is a party, based in part on the "practical difficulties" that arise from tolling private claims. App. 72a-75a (citing *United States ex rel. Sanders* v. *N. Am. Bus Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008)).

3. A sharply divided panel of the Fourth Circuit reversed, with each judge writing separately. App. 1a.

a. The majority held expansively that the WSLA's tolling provision applies to all civil actions, including FCA claims brought by private relators in which the United States has declined to intervene. App. 14a. The majority first rejected the possibility that the statute "by its plain terms applies only to criminal cases," despite the statutory limitation to "offense[s] involving fraud" and the provision's codification in title 18. *Id.* at 13a. The majority relied on a 1944 amendment that removed the words "now indictable under any existing statutes" from the statute. See Contract Settlement Act, Pub. L. No. 78-395, 58 Stat. 649, 667 (1944). Because Congress "did not include any [other] limiting language" to replace the deleted

text, the panel inferred that "Congress * * * chose for the Act to apply" to civil claims. App. 14a.

The majority also rejected the district court's conclusion that the WSLA only applies to actions in which the United States is a party, holding that "whether the suit is brought by the United States or a [private] relator is irrelevant." App. 15a. The majority reasoned that tolling civil claims by private plaintiffs would advance the WSLA's general "purpose" of "root[ing] out fraud against the United States during times of war." *Id.* at 16a.

The panel majority took an equally expansive view of the duration of tolling. The panel acknowledged that the phrase "[w]hen the United States is at war" "may appear unambiguous" in requiring a formal declaration of war to initiate tolling, and did not dispute that the statute required formalities to demonstrate hostilities have ceased. App. 10a. But although the WSLA was enacted against the backdrop of formal war declarations, the court rejected a plain-text reading as "unduly formalistic" and "ignor[ing] the realities of today." *Id.* at 10a-11a. Instead, the panel invoked the asserted "purpose of the WSLA" to toll the statute in an undefined class of "circumstances * * * in which fraud can easily be perpetuated against the United States," including those times when the President has "power to enter into armed hostilities." *Id.* at 12a.

b. The panel thus held that the statute of limitations on Carter's claims had been tolled since at least Congress's October 2002 authorization for the use of military force in Iraq, and would remain tolled until years after the President or Congress eventually formally proclaimed a "termination of hostilities," which the panel concluded had not yet occurred. App. 9a-

13a. The panel recognized that Carter's current claims were "barred" by *Duprey* and a second *qui tam* case that were pending when Carter filed his complaint, and acknowledged the longstanding rule that jurisdiction is determined based on "facts as they existed when the claim was brought." *Id.* at 20a-21a. But the panel nonetheless held that the district court should not have dismissed Carter's complaint with prejudice because the related cases had been dismissed during the pendency of Carter's appeal. In the panel's view, "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." *Id.* at 22a. Because *Duprey* and the Texas action had been dismissed, the panel held there was no prospective bar to "Carter from filing an[other] action." *Ibid.*[2]

c. Judge Agee dissented in part, concluding that the WSLA does not apply to civil *qui tam* cases in which the United States is not a party. App. 31a (Agee, J., concurring in part and dissenting in part). In his view, tolling "could only be logically applied * * * to an action brought by the United States, not by a private relator." *Id.* at 37a. Tolling a relator's claims under the WSLA was inconsistent with "the primary concern motivating Congress": i.e., "the ability of [federal] law enforcement to effectively police fraud against the government during the fog of war," when it is "busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws." *Id.* at 40a-41a. Because private relators do not suffer similar resource constraints, Judge Agee concluded that tolling their claims would "directly thwar[t]" the FCA's purpose of "combat[ing] fraud

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[2] The panel remanded for the district court to consider the FCA's public-disclosure bar, 31 U.S.C. § 3730(e)(4). App. 22a.

quickly" and affording the government time to investigate. *Id.* at 43a, 45a. The panel's holding, Judge Agee explained, gives relators "an expansive limitations period" and incentive to delay bringing claims for years to maximize their monetary value by letting claims accrue. *Id.* at 44a. The Fourth Circuit denied KBR's timely petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. The Panel Has Effectively Eliminated The Statute Of Limitations For Civil Claims of Fraud Against The Government, Contrary To This Court's Precedent And The Text and History Of The WSLA

By effectively repealing the statute of limitations for civil fraud claims, the panel decision breaks sharply from this Court's decisions "narrowly construe[ing]" the WSLA, *Bridges*, 346 U.S. at 216, deepens a division of authority in the lower federal courts, and marks a watershed expansion of FCA and civil fraud liability. This Court's review is needed to resolve doctrinal conflict and confusion and avoid "dire effects" (App. 46a (Agee, J., concurring in part and dissenting in part)) on a wide range of industries.

A. The Panel Disregarded This Court's Instruction That The WSLA Be "Narrowly Construed"

The panel's expansive interpretation of the WSLA breaks from this Court's decisions requiring a narrow construction of that statute.

Bridges v. *United States*, 346 U.S. 209, 215 (1953), rejected an attempt to expand wartime tolling beyond the WSLA's statutory text and purpose. There, the

government brought criminal charges for conspiracy and false statements during a naturalization proceeding, "none of [which] involve[d] the defrauding of the United States in any pecuniary manner." *Id.* at 212-214, 221. The prosecution invoked the WSLA in seeking to revive the time-barred claims. This Court held that the indictment must be dismissed, rejecting the invitation to expand WSLA tolling to the circumstances of that case, citing case law as well as textual and historical evidence that the WSLA is limited to pecuniary frauds. *Id.* at 220-221.

In so doing, the Court articulated interpretative principles for the WSLA that apply equally here. *Bridges* explained that because "[t]he [WSLA] creates an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law," it must be "'narrowly construed.'" 346 U.S. at 215-216 (quoting *United States* v. *Scharton*, 285 U.S. 518, 521-522 (1932)). The Act's history and origin "emphasiz[e] the propriety of its conservative interpretation," and evidence no congressional "purpose to swallow up the three-year limitation to the extent necessary to reach" the government's position in that case. *Id.* at 216. The justification for tolling, the Court recognized, was that in wartime, "[t]he law-enforcement branch of the Government is * * * busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws." 346 U.S. at 219 n.18 (quoting S. Rep. No. 77-1544, at 2 (1942)). There was no warrant, the Court concluded, to expand WSLA tolling beyond the statutory text and purpose. *Id.* at 220.

In *United States* v. *Smith*, 342 U.S. 225, 230 (1952), this Court took a similarly narrow view, refusing to "strai[n] the language of the [WSLA] to sus-

pend the running of the statute beyond the emergency which made the suspension seem advisable." The Court rejected the government's invitation to apply the WSLA to crimes committed after the date of termination of hostilities, explaining that the statute reflects a "fear * * * that the law-enforcement officers would be so preoccupied with the prosecution of the war effort that the *crimes* of fraud perpetrated against the United States would be forgotten until it was too late." *Id.* at 222-229 (emphasis added). The Court declined to rely on policy considerations (there, a purported need to toll offenses "committed during the post-hostilities period") to "alte[r] * * * the statutory scheme." *Id.* at 228-229. Justice Clark's concurrence emphasized that "Congress intended to give the Department [of Justice] more time to apprehend, investigate, and prosecute offenses occurring 'under the stress of present-day events' of the war," and rejected applying the statute to "cases ha[ving] nothing to do with the war or the reconversion thereafter." *Id.* at 230 (Clark, J., concurring). See also *United States* v. *Klinger*, 199 F.2d 645, 646 (2d Cir. 1952) (L. Hand, J.) (rejecting an interpretation of the WSLA that would "more than doubl[e] the existing period of limitation," a "consequenc[e]" "that Congress certainly would not have tolerated").

The panel's approach cannot be reconciled with *Bridges* and *Smith*'s requirement of a "narro[w] constru[ction]" of the statute, because the panel bypassed numerous other readings that would not have led to a dramatic expansion of WSLA tolling. For example, the panel did not give the term "offense" its ordinary meaning (a criminal offense), instead interpreting the statute as if it used the far broader word "claim." See, *e.g.*, Black's Law Dictionary 1110 (8th

ed. 2004) ("offense" defined to mean "[a] violation of the law; a crime" and synonymous with "criminal offense"); American Heritage Dictionary 1255 (3d ed. 1992) (defining "offense" as "[a] transgression of law; a crime"). The panel similarly declined to give effect to the WSLA's codification in title 18, or its historical purpose of accommodating delays caused by burdens on criminal prosecutors, which Congress has noted time and again when modifying and reenacting the provision. See, *e.g.*, S. Rep. No. 110-431, at 1-2 (2008) (purpose of legislation is to "protect American taxpayers from criminal contractor fraud" and "mak[e] the law consistent with the current statute of limitations for criminal fraud offenses"); *Smith*, 342 U.S. at 228-229 (noting "fear" that "crimes of fraud * * * would be forgotten until it was too late"); *id.* at 228-229 n.2 (noting legislative history of 1942 enactment and 1944 amendment). Instead, the panel tolled civil fraud claims indefinitely, adopting an open-ended definition of the term "war," despite recognizing that the "unambiguous" statutory text might be construed to require a formal declaration. The panel's maximalist approach is the antithesis of a "conservative interpretation" or "narro[w] constru[ction]." *Bridges*, 346 U.S. at 216.

In extending the WSLA to civil cases, the panel relied on a 1944 amendment deleting the phrase "now indictable under any existing statutes" from language describing the "offenses" subject to tolling. App. 8a, 13a-14a. But this Court's admonishments of narrow construction involved the post-1944 statute. See *Bridges*, 346 U.S. at 211-212 (involving conduct that occurred in 1945); *Smith*, 342 U.S. at 226 (conduct occurred in 1947). And a mere four years after the 1944 amendment, Congress enacted a comprehensive

recodification and reorganization of the federal criminal law that confirmed the WSLA's criminal focus. That enactment "include[d] all pertinent laws" in title 18—including the WSLA under its current citation, 18 U.S.C. § 3287—to "mak[e] it easy to find the criminal statutes." 94 Cong. Rec. 8906 (daily ed. June 18, 1948). Plainly, Congress in 1948 saw nothing in the recent deletion of "now indictable under any existing statutes" that expanded the statute beyond its criminal scope. The Senate Judiciary Committee took a similar view when it revised the statute in 2008, explaining that the 1940s statute "extended the time prosecutors had to bring charges relating to criminal fraud offenses." See S. Rep. No. 110-431, at 2.

Nor does the deletion of "now indictable" compel the panel's holding. That change may simply have indicated that the WSLA would not revive criminal claims whose statutes of limitations had already lapsed, a concern that began to diminish once the war and tolling ended, or to extend tolling to non-felony criminal offenses. Contrary to the panel's view, courts should not presume that Congress has "transform[ed] the scope" of a statute to encompass both criminal *and civil* fraud through a minor (and ambiguous) textual change—particularly for a statute this Court has directed be "narrowly construed." *Wimberly* v. *Labor & Indus. Relations Comm'n of Mo.*, 479 U.S. 511, 518-19 (1987); *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress * * * does not alter the fundamental details of a [statutory] scheme in vague terms or ancillary provisions—it

does not, one might say, hide elephants in mouseholes.").[3]

B. The Panel Ignored *Gabelli*'s Rejection Of Indefinite Tolling

The panel's position is also at odds with the recent decision in *Gabelli*, where this Court squarely rejected a claim to indefinite tolling of a statute of limitations. *Gabelli* held that the five-year statute of limitations applicable to claims of investment fraud runs from the date the offense is complete, not when the fraud is discovered. 133 S. Ct. at 1219. In a portion of its analysis central to that holding, this Court observed that statutes that expressly allow tolling (e.g., to account for delays in discovering a violation) typically "couple that rule with an absolute provision for repose." *Id.* at 1224. This Court specifically cited as an example of an "*absolute* provision for repose," *id.*,

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[3] The panel also relied on a handful of cases from the 1950s (and one recent unpublished district court decision) applying the WSLA to civil claims. App. 14a. In all but one of those cases, the United States itself was a plaintiff. The sole court of appeals decision to allow tolling applied the WSLA to civil claims (or assumed it would apply) without analyzing the question or even acknowledging the possibility it would be limited to criminal cases. See *United States* v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954). *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), concluded that "the history of the Suspension Act from its genesis * * * is persuasive to the conclusion that Congress intended only to toll the running of existing statutes of limitations as a bar to *criminal* prosecutions," *id.* (emphasis added), and in reversing on other grounds, the court of appeals did not revisit that conclusion. See *United States* v. *Weaver*, 207 F.2d 796 (5th Cir. 1953). *United States ex rel. McCans* v. *Armour & Co.*, 146 F. Supp. 546, 551 (D.D.C. 1956), held that the civil claims were untimely even with WSLA tolling, so any statement about applying that statute in the civil context was dicta.

the FCA's discovery rule, under which the United States may bring a civil claim "3 years after the date" material facts are (or should have been) known—"*but in no event* more than 10 years after the date on which the violation is committed," 31 U.S.C. § 3731(b)(2) (emphasis added).

The panel's authorization of indefinite tolling of FCA claims pursuant to the WSLA is impossible to square with this Court's understanding that the statute provides "an absolute provision for repose." 133 S. Ct. at 1224. In the panel's view, the WSLA has already tolled fraud claims for at least 11 years (i.e., since 2002), and the opinion identifies no principle limiting its application to Operation Iraqi Freedom. On the contrary, the panel's reasoning may support tolling since the beginning of U.S. operations in Afghanistan (i.e., 2001) or even Operation Desert Storm (1991). App. 10a-13a; see also *id.* at 29a (Wynn, J., concurring) (concluding that "extended or indefinite limitations period is warranted" and noting that "Congress has elected to entirely do away with limitations periods" for particularly heinous crimes such as murder and terrorism). And because its opinion applies equally to claims brought by the government and private relators, the panel effectively allowed a general criminal-code tolling provision to supersede the FCA's specific mandate that claims be brought "in no event more than 10 years" after the alleged violation. 31 U.S.C. § 3731(b)(2); *Gabelli*, 133 S. Ct. at 1224; contra *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

Indefinite tolling also conflicts with *Gabelli*'s criticism of requiring defendants to face liability "not only

for [six] years after their misdeeds, but for an additional uncertain period into the future." "'[E]xtend[ing] the limitations period to many decades,'" *Gabelli* explained, was "'beyond any limit that Congress could have contemplated'" and would "'thwar[t] the basic objective of repose underlying the very notion of a limitations period.'" 133 S. Ct. at 1223 (quoting *Rotella* v. *Wood*, 528 U.S. 549, 554 (2000)). *Gabelli*'s affirmation of repose in the context of civil penalties aligns with the FCA's own repose provision protecting defendants against damages and penalties after 10 years, and is consistent with other circuits' conclusion that "Congress certainly would not have tolerated" using the WSLA to effect such an expansion of the ordinary statutory limitations period. *Klinger*, 199 F.2d at 646 (L. Hand, J.).

C. The Decision Below Deepens A Conflict Of Authority And Sows Confusion On An Important Threshold Issue

The panel decision deepens confusion and conflict in lower federal courts about whether WSLA tolling "[w]hen the United States is at war" applies in the absence of a formal declaration.[4] As the panel cor-

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[4] The parties disagree about whether a 2008 amendment to the WSLA applies, given that the complaint was filed in 2011 but alleges conduct from 2005. The pre-amendment statute applies "[w]hen the United States is at war" and tolls "until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." 18 U.S.C. § 3287 (2006). In 2008, Congress amended the WSLA to cover periods "[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces," and extended the suspension period until "5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." Wartime Enforcement of Fraud Act, Pub. L. No. 110-

rectly acknowledged, "courts are in conflict" on this question. App. 10a. Compare *United States* v. *Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993) ("[f]or the Persian Gulf conflict to have amounted to a war under 18 U.S.C. § 3287, Congress should have formally recognized that conflict as a war"); and *United States* v. *Anghaie*, No. 1:09-cr-37, 2011 WL 720044, at *2 (N.D. Fla. Feb. 21, 2011) (holding that "the United States was not 'at war' [under the pre-2008] * * * WSLA, as there had been no Congressional declaration of war"); and *United States* v. *Western Titanium, Inc.*, No. 08-cr-4229, 2010 WL 2650224, at *1, 3-4 (S.D. Cal. July 1, 2010) ("a narrow construction of the term 'at war' in the WSLA requires a finding that it encompasses only those wars which have been formally declared by Congress," not including conflict in Iraq), with *United States* v. *Prosperi*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008) ("the 'at war' provision of the [WSLA] was intended to capture any authorized military engagement that might compromise or impede the government's ability to investigate allegations of fraud" even without formal declaration of war); and App. 11a ("the Act does not require a formal declaration of war").

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417 § 855, 122 Stat. 4545 (2008) (codified at 18 U.S.C. § 3287 (2009 Supp.)). The panel did not decide which version of the statute applies to respondent's claims, concluding that both extend to civil actions. The panel also concluded that the United States was "at war" under either version, and so did not address the amended language referring to an "authorization for the use of the Armed Forces." App. 10a-13a. The questions presented in this petition—whether the WSLA tolls civil claims brought by private plaintiffs, and whether the panel was correct in determining the statutory suspension period had been triggered—apply to both versions of the statute, and thus this Court similarly need not address the applicability of the 2008 amendment.

"[T]he existence of a conflict between the decision of a court of appeals and that of a district court" is "a factor tending to reinforce" the need for certiorari review, particularly where the decisions demonstrate "lower court confusion over an otherwise important question." Eugene Gressman et al., Supreme Court Practice 256-258 (9th ed. 2007). In *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978), for instance, this Court granted certiorari based on a conflict between a court of appeals and a single district court. And in *Curtis* v. *Loether*, 415 U.S. 189, 191 n.2 (1974), this Court cited "evenly divided" district court decisions as a reason for granting certiorari.

Those principles support certiorari here. In addition to a square conflict of holdings between a court of appeals and three district courts about whether a congressionally-declared war is necessary to trigger tolling, lower courts have relied on vastly different analytical approaches. *Shelton*, for instance, observed that "[t]he Judicial Branch of the United States has no constitutional power to declare a war," and relied on evidence from practice and history that the WSLA "does not appear to have ever been used" during post-1945 conflicts, such as Vietnam. 816 F. Supp. at 1135. *Shelton* declined to rely on "[w]hether an armed conflict is a war for the purposes of military rules and regulations," which it found "distinct" from the inquiry "for civilian purposes." *Ibid.* By contrast, *Prosperi* required what one judge termed "extensive post-hoc factual determinations" (*Western Titanium*, 2010 WL at 2650224, *3) on a range of issues, including: (1) the extent of Congress's authorization for the President to act; (2) whether the conflict is deemed a "war" under other definitions of the term and international law; (3) the conflict's size and scope; and (4)

the diversion of resources that might have been expended on investigating frauds against the government. 573 F. Supp. at 449. That these diverse approaches threaten to "entangl[e]" the Judiciary in an "are[a] reserved for the [political] Branches," *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989)—the declaration of a state of war—demonstrates the importance of the issue.

The lack of internal coherence in the panel's decision sows further confusion. In contrast to the panel's loose, "purpose"-based interpretation of the requirements to *begin* tolling, it strictly enforced the statute's textual formalities for *ending* tolling. That asymmetry virtually ensures indefinite tolling, and ignores the reality that the President and Congress have little incentive to disclaim wartime powers or to end undeclared hostilities in the formal way contemplated in the WSLA, particularly as tolling "is at most a tertiary consideration" (App. 26a (Wynn, J., concurring)) for the political branches in times of armed conflict. That is particularly true for the conflict against al Qaeda, which arguably preceded the attacks of September 11, 2001, and shows no signs of abating.

Finally, in wading into the difficult and fundamentally political question of when a war begins and ends, the panel strangely ignored what the legislative branch had to say on the question. The panel gave no weight to Congress's understanding of the WSLA's scope and purpose during the 2008 amendments, which reflected an understanding that the "military operations in Iraq and Afghanistan" were "likely exempt from" WSLA tolling because of the absence of a formal declaration of war. S. Rep. No. 110-431, at 4 (2008) (view of Senate Judiciary Committee).

D. This Issue Is Important And Recurring

The enormous practical consequences of the panel's decision reinforce concerns about its (atextual) interpretation. Wholly apart from the decade-long tolling from the conflict in Iraq explicitly embraced by the panel decision (contrary to the FCA's "absolute" 10-year statute of repose, *Gabelli*, 133 S. Ct. at 1224), the panel's analysis suggests other, even earlier, conflicts may have triggered ongoing tolling. The first Persian Gulf War, for instance, was initiated by a congressional authorization for the use of military force, not a formal declaration of war, see Pub. L. No. 102-1, 105 Stat. 3 (1991), and ended with a cease-fire memorialized in communications to the U.N. Security Council, see U.N. Doc. S/22485 (Apr. 11, 1991), not a presidential proclamation or concurrent resolution. See, *e.g.*, Barbara Salazar Torreon, Cong. Research Serv., RS21405, U.S. Periods of War and Dates of Current Conflicts 5-6 (2012) (noting lack of "official end date" for Persian Gulf War). There is no reason the panel's logic could not be extended back another decade or more. And "given that the U.S. has rarely experienced complete peace for more than five years, the Fourth Circuit's reading of the law would expand the statute of limitations nearly indefinitely * * * ." Dietrich Knauth, *4th Circ. Shows Expired FCA Claims Can Haunt Contractors*, Law360 (Mar. 27, 2013).

The panel's decision is already having serious practical effects, and the issue is of growing importance as the WSLA is increasingly cited to revive stale claims. Because the WSLA does not textually limit its sweep to claims involving defense contracting or the war effort, relators in non-intervened *qui tam* lawsuits have cited the decision in seeking to re-

vive time-barred claims in cases having "nothing to do with [any] war," *Smith*, 342 U.S. at 230 (Clark, J., concurring).[5] The theory adopted by the court below "is gaining traction, including in cases outside the defense industry," Andrew Schilling, Michelle Rogers, & Ross Morrison, *Wartime Suspension of Limitations Act Suspends Statute of Limitations in False Claims Act Cases* (May 2, 2013), available at http://www.jdsupra.com/legalnews/wartime-suspension-of-limitations-act-su-50700/, and could be applied in any civil case, from financial institutions to healthcare providers to medical implement- or drug-makers. The government in particular is aggressively employing the WSLA outside the defense context. "[T]he government's use of the law has more than doubled" just since 2008, and the government has invoked the provision to toll fraud claims more in just the past four years than in the previous 47 combined. See Reed Albergotti, *U.S. Uses Wartime Law to Push Cases Into Overtime*, Wall St. J., Apr. 16, 2013, at C1.

The panel decision will have a disproportionate effect on nationwide FCA jurisprudence given the concentration of *qui tam* cases in the Fourth Circuit. Even before the panel's decision, relators favored

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[5] See, *e.g.*, Relator's Supplemental Opp'n to the Defs.' Mot. to Dismiss, *United States ex rel. Emanuele* v. *Medicor Assocs., Inc.*, No. 10-cv-245 (W.D. Pa. Mar. 29, 2013) (Docket No. 84) (private relator citing Fourth Circuit's decision to avoid dismissal of untimely claims involving Medicare and Medicaid reimbursement); Reena Dutta, *Old Fraud Claims May Still Be Actionable Under Wartime Suspension of Limitations Act* (Mar. 27, 2013) ("As a result of this decision, courts will likely be seeing older fraud claims brought under the act."), available at http://blog.thewhistleblowerattorney.com/2013/03/27/old-fraud-claims-may-still-be-actionable-under-wartime-suspension-of-limitations-act/.

courts in that jurisdiction: The two Fourth Circuit district courts comprising the Washington D.C. suburbs, where numerous government agencies and contractors are headquartered, are among the top ten venues nationwide for *qui tam* actions. See Gov't Accountability Office, *Qui Tam* Cases Filed in U.S. District Courts at 27 (2006), available at http://www.gao.gov/new.items/d06320r.pdf. That preference will become more pronounced given the panel's relator-friendly decision and the FCA's flexible nationwide venue provision. See 31 U.S.C. § 3732(a) (case "may be brought in any judicial district in which the defendant * * * can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred").

The panel decision thus has grave implications for potential fraud defendants, by requiring them to defend against stale fraud claims years or even decades later, as memories fade and helpful evidence is lost. It places intolerable burdens on companies, by requiring them to either retain documents indefinitely or risk discarding records that may only become relevant years later when an unforeseen fraud claim is filed. The panel's interpretation also raises due process concerns, by extending indefinitely a statute of limitations after the relevant conduct has occurred, regardless of whether the statute has already run for those claims. See, *e.g.*, *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (retroactive "manipulat[ion]" of statutes of limitation may "offend the Constitution"); *William Danzer & Co.* v. *Gulf & Ship Island R.R. Co.*, 268 U.S. 633, 637 (1925) (retroactive extension of limitations period can implicate due process). The panel majority's interpretation has fundamental

implications for the government's relationships with potential contractors.

II. The Panel Has Transformed the FCA's "First-to-File" Bar Into A "One-Case-At-A-Time" Rule, Contrary To The Conclusion of Numerous Courts

Compounding the practical effects of indefinite tolling, the panel eviscerated the statutory "first-to-file" bar, allowing relators to sidestep this crucial limitation on duplicative lawsuits by re-filing a copy of their complaint after the earlier case is dismissed—or, for that matter, after it is reduced to judgment. That position cannot be reconciled with the conclusions of numerous courts of appeals, which prohibit a relator from evading the first-to-file bar through similar procedural maneuvers, and it squarely conflicts with the holding of several lower courts.

A. The Panel Decision Conflicts With Decisions Of Other Courts

The panel's conclusion that the first-to-file bar does not prohibit refiling duplicative actions after earlier actions are dismissed accords with decisions of the Seventh and Tenth Circuits. See *United States ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963-964 (10th Cir. 2009). But it departs from the conclusion of numerous other courts that have held that duplicative claims prohibited by the first-to-file bar may not be evaded by procedural maneuvers; as the Fifth Circuit concluded, "allow[ing] an infinite number of copycat *qui tam* actions * * * cannot be reconciled with § 3730(b)(5)'s goal of preventing parasitic [suits]."

United States ex rel. Branch Consultants v. *Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009).

United States ex rel. Lujan v. *Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), is illustrative. There, the district court dismissed the relator's claims because an earlier-filed related case was pending when the relator filed her action. *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, No. 92-cv-1282, 2000 WL 33775399 (C.D. Cal. Jan. 20, 2000). Despite the fact that the earlier-filed case was later dismissed, the court held that allowing the relator's claims to go forward "would strip the provision of meaning," because § 3730(b)(5) "create[s] a 'first to file' rule which would prevent multiple separate suits based on the same claims." *Id.* at *3. "[A]llow[ing] subsequent *qui tam* lawsuits to be filed as long as the previously-filed *qui tam* actions had been dismissed would be entirely contrary to the goals of § 3730(b)(5)." *Ibid.* The Ninth Circuit affirmed, holding that § 3730(b)(5) constitutes "an exception-free, first-to-file bar" consistent with the "dual [statutory] purposes" of "promot[ing] incentives for whistle-blowing insiders and prevent[ing] opportunistic successive plaintiffs," 243 F.3d at 1187.

The First Circuit, in *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 32-34 (1st Cir. 2009), similarly affirmed the dismissal of claims on first-to-file grounds even when the prior suit had been dismissed before the date of the subsequent complaint. Accord *United States ex rel. Koerner* v. *Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 450 n.8 (E.D. La. 1996) (dismissed action would remain preclusive under the first-to-file bar). The leading False Claims Act treatise takes the same view, explaining that the rationale for applying the first-to-file bar

when an earlier-filed complaint is dismissed during the pendency of a later-filed case "applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." See John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.03[C][2][b] (4th ed., CCH 2012). As the treatise explains, even when an earlier-filed case has been dismissed without being unsealed, "the fundamental purpose of the first-to-file bar has been satisfied in such cases, because—dismissed or not, and unsealed or not—they have 'alerted the government to the essential facts' of an alleged fraud on the government." *Ibid.* (quoting *Grynberg*, 390 F.3d at 1279).

Other courts have held that a relator cannot evade the first-to-file bar by staying an action pending the potential dismissal of an earlier-filed case, or reviving barred claims through amendment. See, *e.g.*, *Makro Capital of Am., Inc.* v. *UBS AG*, 543 F.3d 1254, 1260 (11th Cir. 2008) (relator cannot avoid first-to-file bar through "relation back" under Rule 15 because the private plaintiff "is merely acting as a stand-in for the government" and the "corresponding government-initiated action would have involved only a single suit"); *United States ex rel. Ortega* v. *Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 14 (D.D.C. 2003) ("Amendment does not provide a back door to avoid this exception-free [first-to-file] bar"). The panel here approved an approach that is materially indistinguishable from the rationale of, and outcome in, those cases: having re-filed his complaint three times following repeated dismissals, Carter is now invited to file a fourth copy of a virtually identical complaint. Serial re-filing defeats the first-to-file bar just as

surely as restating allegations through amendment or reviving a complaint held in abeyance.

Based on similar reasoning, several district courts have squarely held that the first-to-file bar prevents a relator from re-filing his complaint once an earlier-filed case is dismissed. *United States ex rel. Shea* v. *Verizon Bus. Network Servs., Inc.*, 904 F. Supp. 2d 28 (D.D.C. 2012), appeal pending (No. 12-7133) (D.C. Cir.), dismissed a relator's complaint with prejudice after extensive briefing on the first-to-file issue. The court rejected the relator's position that he could re-file a copy of his complaint "the next day" because the earlier-filed case had since been dismissed. *See* Order, *Shea*, No. 1:09-cv-1050 (D.D.C. Dec. 27, 2012) (Docket No. 67). Similarly, *United States ex rel. Powell* v. *Am. InterContinental Univ. Inc.*, No. 1:08-cv-2277, 2012 WL 2885356, at *5 (N.D. Ga. July 12, 2012), held that the panel's position here "would create perverse incentives and 'reappearing' jurisdiction," allowing "a relator * * * to file, dismiss, and re-file identical *qui tam* actions, thus encouraging forum shopping and wasting government resources that would be required to review the claims in each action." The panel decision also conflicts with the practice of district courts nationwide, which *routinely* dismiss claims with prejudice under the first-to-file bar.[6] That widespread practice cannot be squared

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[6] See, *e.g.*, *United States ex rel. Ortega* v. *Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 20-21 (D.D.C. 2003) (dismissing complaint "with prejudice in its entirety," with portion of dismissal based on "the first-to-file rule of § 3730(b)(5)"); *United States ex rel. Pfeifer* v. *Ela Med., Inc.*, No. 07-cv-1460, 2010 WL 1380167, at *15 (D. Colo. Mar. 31, 2010) (dismissing claims "with prejudice under the first-to-file bar"); see also *United States ex rel. Torres* v. *Kaplan Higher Educ. Corp.*, No. 09-cv-21733, 2011 WL 3704707, at *6 (S.D. Fla. Aug. 23, 2011); *United*

with the decision below. Under the panel's view, no case can *ever* be dismissed with prejudice on first-to-file grounds, because every earlier-filed case will eventually proceed to final judgment or face dismissal, and thus will no longer be pending.

B. The Panel's Decision Is Wrong

The panel's "one-case-at-a-time" rule encourages plaintiffs "to allow false claims to build up over time" to maximize the value of the alleged fraud (*Sanders*, 546 F.3d at 295; accord App. 37a-38a (Agee, J., dissenting))—and to re-plead those claims repeatedly, even if related claims have been litigated in other cases in a manner sufficient to put the government on notice of the allegations. But "[o]nce the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied." *Grynberg*, 390 F.3d at 1279; see also *ibid.* ("Once an initial *qui tam* complaint puts the government and the defendants on notice of its essential claim, all interested parties can expect to resolve that claim in a single lawsuit."); *United States ex rel. Fine* v. *Sandia Corp.*, 70 F.3d 568, 571-572 (10th Cir. 1995); *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (first-to-file bar applies where initial suit provides "sufficient notice for the government to initiate an investigation"). "[D]uplicative

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States ex rel. Becker v. *Tools & Metals, Inc.*, No. 05-cv-0627, 2009 WL 855651, at *14 (N.D. Tex. Mar. 31, 2009); *Her* v. *Regions Fin. Corp.*, No. 07-cv-2017, 2008 WL 5381321, at *3 (W.D. Ark. Dec. 22, 2008); *United States ex rel. Harris* v. *Alan Ritchey, Inc.*, No. 00-cv-2191, 2006 WL 3761339, at *7 (W.D. Wash. Dec. 20, 2006); *United States ex rel. Friedman* v. *Eckerd Corp.*, 183 F. Supp. 2d 724, 725 (E.D. Pa. 2001); *United States ex rel. Wilson* v. *Emergency Med. Assocs. of Ill., Inc.*, No. 01-cv-4558, 2000 WL 34026709, at *2-3 (N.D. Ill. Sept. 24, 2000).

claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998).

If the first-to-file bar is transformed into a simple sequencing rule, it provides no incentive for relators to file promptly. App. 37a-38a (Agee, J., dissenting); contra *id.* at 30a (Wynn, J., concurring). Nor does it encourage relators to disclose in their first suit all information about potential fraud. The panel's interpretation thus *undermines* the statutory purpose of helping the government promptly to pursue fraud.

The panel concluded its reading was warranted because the first-to-file bar provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may * * * bring a related action based on the facts underlying the pending action," 31 U.S.C. § 3730(b)(5), and the prior actions at issue here were no longer "pending" at the time of its decision. But, by its own terms, the statutory term "pending" is not a time limit on the jurisdictional bar, but a drafting short-hand to distinguish between first-filed action ("the facts underlying the pending action") and any subsequent matter. *Powell*, 2012 WL 2885356, at *4. If Congress had intended the bar to apply only "while the first-filed action is pending," it surely would have said so explicitly.

The legislative history of the provision also undermines the panel's cramped interpretation. The Senate Committee Report accompanying the False Claims Amendments Act of 1986 that added the bar explicitly states that *qui tam* "enforcement * * * is not meant to produce * * * multiple separate suits based

on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986). The House Report also weighs against the panel's approach by omitting any mention of the word "pending" from its explanation that under the first-to-file bar, "[w]hen an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). Had that word been meant as a substantive limit on the bar, rather than as a description of the first-filed action, the legislative history would be expected to reflect that fact.

III. This Case Is An Attractive Vehicle For Resolving Both Issues

This case is an excellent vehicle to provide guidance to lower courts about one of the most frequently litigated limits on FCA claims, and application of the WSLA, which has mushroomed in importance in recent years. KBR presented both issues to the district court and court of appeals, and both issues were fully briefed and squarely decided. Both issues involve pure questions of law for which there are no unresolved factual issues that might prevent a definitive resolution. This Court has the benefit of three separate opinions concerning the judgment below outlining different bases for decision, in addition to extended discussions of the WSLA and FCA in recent case law.[7]

This case is a particularly appropriate vehicle because its facts illustrate the interaction of the first-to-

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[7] See, *e.g.*, *United States* v. *Prosperi*, 573 F. Supp. 2d 436 (D. Mass. 2008) (WSLA); *United States* v. *Shelton*, 816 F. Supp. 1132 (W.D. Tex. 1993) (same); *Lujan*, 243 F.3d at 1188 (first-to-file); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 963 (same); *Poteet*, 552 F.3d at 515 (same).

file bar and the statute of limitations. The procedural history of this litigation—which is now in its seventh year, and which involves a relator who has filed three *identical copies* of his complaint after a series of dismissals and is now invited to file a fourth—brings into sharp relief the practical consequences of an overbroad application of the WSLA and an unduly narrow construction of the FCA's first-to-file bar. The threat of an "infinite series of claims," *Branch Consultants*, 560 F.3d at 378, is anything but hypothetical here, providing this Court a concrete set of facts against which to determine the appropriate role of wartime tolling together with the FCA's first-to-file bar.[8]

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[8] That the panel remanded to the district court to address the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), is no obstacle to this Court's resolution of these issues. That provision serves as a textually independent bar for actions "based upon the public disclosure of allegations or transactions." *Ibid.* Thus, the issues in the petition are outcome-determinative: if this Court were to reverse the panel on either the WSLA or the first-to-file issues, it will eliminate the need for a remand. And regardless of how the district court rules on public disclosure, the panel's precedential decision on the WSLA and the first-to-file bar will continue to support efforts by relators nationwide to revive and maintain otherwise-untimely fraud claims. "The possibility that [a party] might ultimately" prevail on other grounds "would not prevent the Court from addressing the questions presented in the petition. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary." Cert. Reply Br. for the Fed. Pet'rs 10-11, *Salazar* v. *Patchak*, 132 S. Ct. 2199 (2012) (11-247) (citing *Skinner* v. *Switzer*, 131 S. Ct. 1289, 1300 (2011); *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2995 n.28 (2010)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1011

UNITED STATES EX REL. BENJAMIN CARTER,
PLAINTIFF-APPELLANT,

v.

HALLIBURTON CO.; KELLOGG BROWN & ROOT SERVICES, INC.; SERVICE EMPLOYEES INTERNATIONAL, INC.; KBR, INC., DEFENDANTS-APPELLEES.

Argued Oct. 26, 2012 Decided March 18, 2013

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:11-cv-00602-JCC-JFA)

Before: AGEE, WYNN, and FLOYD, *Circuit Judges*.

Reversed and remanded by published opinion. Judge FLOYD wrote the majority opinion, in which Judge WYNN joined. Judge WYNN wrote a separate concurring opinion. Judge AGEE wrote a separate opinion concurring in part and dissenting in part.

FLOYD, *Circuit Judge*:

Appellant Benjamin Carter appeals the district court's dismissal of his complaint with prejudice. The matter was initiated upon Carter's filing of a qui tam lawsuit under the False Claims Act (FCA), 31 U.S.C. § 3729. The subject matter underlying this case involves Appellees'—Halliburton Company; KBR, Inc.; Kellogg Brown & Root Services, Inc.; and Service Employees International, Inc. (collectively KBR)—alleged fraudulent billing of the United States for services provided to the military forces serving in Iraq. The district court concluded that it lacked subject matter jurisdiction over Carter's claims because of the False Claims Act's first-to-file bar, 31 U.S.C. § 3730(b)(5). The district court also held that Carter's complaint had been filed beyond the six-year statute of limitations in the FCA and was not tolled by the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, which the court ruled does not apply to non-intervened qui tam cases. Accordingly, the district court dismissed Carter's complaint with prejudice. Because we conclude that the district court had subject matter jurisdiction and find that the WSLA applies to this action, we reverse. Further, because it may be appropriate for the district court to make factual findings to consider the public disclosure claim urged by KBR, we remand so the district court can consider this issue.

I.

In his complaint, Carter brings a qui tam action under the False Claims Act, 31 U.S.C. §§ 3729 through 3733. The FCA allows the United States to bring suit to recover funds and also allows, through the Act's qui tam provisions, for a private plaintiff

(relator) to sue in place of the government and keep a share of the proceeds. *See* 31 U.S.C. § 3730(a)–(d). Carter alleges that KBR falsely billed the United States for services performed in Iraq. Specifically, Carter alleges that KBR "knowingly presented to an officer or employee of the United States Government false or fraudulent claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1)." Carter goes on to allege that KBR "knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the Government" in violation of 31 U.S.C. § 3729(a)(2).

KBR provided logistical services to the United States military in Iraq under a government contract. Carter worked for KBR as a reverse osmosis water purification unit (ROWPU) operator at two camps in Iraq from mid-January 2005 until April 2005. Carter was hired to test and purify water for the troops in Iraq. Carter claims that KBR was in fact not purifying water during the time period but was repeatedly misrepresenting to the United States that it was. Carter submits that water purification did not actually begin until May 2005. Further, Carter maintains that he and his fellow employees were instructed to submit time sheets for twelve-hour days for work that they performed on ROWPU functions. During this time, Carter states that he was actually not working any hours on ROWPU functions. Carter also contends as part of an overall scheme by KBR to overbill the government for labor charges, that all trade employees were required to submit time sheets totaling exactly twelve hours per day and eighty-four hours per week and that it was "routine practice" of the employees to do so regardless of actual hours worked. As

a result, according to Carter, the United States paid KBR for work not actually performed.

Carter filed his original complaint under seal on February 1, 2006, in the United States District Court for the Central District of California. *United States ex rel. Carter v. Halliburton Co.*, No. 06–cv–0616 (C.D. Cal. filed Feb. 1, 2006). After over two years of investigation into the matter, the action was unsealed in May 2008. Shortly thereafter, the case was transferred to the Eastern District of Virginia in October 2008, at which point Carter amended his complaint. *United States ex rel. Carter v. Halliburton Co.*, No. 08–cv–1162 (E.D. Va. filed Feb. 1, 2006). The district court dismissed Carter's first amended complaint without prejudice in January 2009 for failure to plead fraud with particularity. Carter then amended his complaint for a second time and re-filed his complaint in January 2009 (*Carter 2009*). KBR then moved to dismiss Carter's second amended complaint under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, which the district court granted in part. The district court, however, refused to dismiss counts 1 and 4. Count 1 alleged a scheme by KBR to submit fraudulent claims for payment to the government, and count 4 alleged fraudulent statements knowingly made to the government to receive claims for payment. At this point, KBR answered the remaining allegations and the case proceeded through discovery, which closed in March 2010.

In March 2010, one month before the scheduled trial date, the parties were contacted by the United States Department of Justice, who informed them of the existence of a False Claims Act case containing similar allegations filed under seal in December 2005,

in the United States District Court for the Central District of California, *United States ex rel. Thorpe v. Halliburton Co.*, No. 05–cv–08924 (C.D. Cal. filed Dec. 23, 2005). *Thorpe* also alleges that KBR's standard operating procedure was billing twelve hours per day, without regard to the actual hours worked to perpetuate a scheme to overbill the government. In April 2010, KBR filed a motion to dismiss *Carter 2009*, arguing that *Thorpe* constituted a "related" action under FCA § 3730(b)(5). In response, Carter argued that *Thorpe* was materially different from his case because he focused on KBR's alleged fraudulent misrepresentation to the government that KBR was actually performing water services for which it was submitting bills.

The district court rejected Carter's characterization, reasoning that he must show that KBR employees were reporting hours that they did not work and the fact that KBR was not performing water services is merely evidence that the time sheets were false. The district court dismissed *Carter 2009* without prejudice on May 10, 2010. *Carter*, No. 08–cv–1162. Carter appealed the dismissal on July 13, 2010.

Thereafter, the United States District Court for the Central District of California dismissed the *Thorpe* action on July 30, 2010. In response, Carter re-filed his complaint (*Carter 2010*) in the United States District Court for the Eastern District of Virginia while his appeal was still pending. *United States ex rel. Carter v. Halliburton Co.*, No. 10–cv–864 (E.D. Va. filed Aug. 4, 2010). When Carter re-filed his complaint, he also sought to dismiss his appeal in the 2009 action. This Court granted Carter's motion to dismiss his appeal on February 14, 2011.

Meanwhile, *Carter 2010* proceeded in the district court and, on May 24, 2011, the district court dismissed Carter's complaint without prejudice, on the grounds that Carter had filed *Carter 2010* while *Carter 2009* was still pending on appeal, thereby creating his own jurisdictional bar under the FCA's first-to-file provision. *Carter*, No. 10–cv–864. Carter chose not to appeal this ruling.

However, Carter re-filed his complaint (*Carter 2011*) on June 2, 2011. *United States ex rel. Carter v. Halliburton Co.*, No. 11–cv–602 (E.D. Va. filed June 2, 2011). The district court unsealed the complaint on August 24, 2011. The complaint in this case is identical to the earlier 2010 complaint as well the second amended complaint filed in 2009. After the complaint was unsealed, KBR moved to dismiss the action, arguing that the complaint was barred by two related actions, that the case was time barred, and that the case was barred by the public disclosure provision of the FCA.

At the time *Carter 2011* was filed, two allegedly related cases were pending: *United States ex rel. Duprey*, No. 8:07–cv–1487 (D. Md. filed June 5, 2007) and another action—that is under seal—filed in Texas in 2007. Duprey and the Texas action allege that KBR "knowingly presented, or caused to be presented, to an officer or employee of the United States Government, false or fraudulent claims for payment or approval in violation of 31 U.S.C. § 3729(a)(1)." Since at least March 2003, KBR provided shipping and transportation support in Iraq for the United States military. The *Duprey* relator was employed by KBR as a truck driver in Iraq from March 27, 2005, to January 15, 2006. The Texas relators were also

truck drivers in Iraq, and at least one relator was present in Iraq during the period of September 2003 to March 15, 2004. Both complaints allege substantially similar claims, namely that KBR had a policy that its drivers enter time sheets reflecting a twelve hour workday and an eighty-four hour work week, without regard to actual hours worked. The relators alleged that this practice was widespread throughout KBR's operations in Iraq and elsewhere. *Duprey* was subsequently voluntarily dismissed in October 2011, and the Texas action was voluntarily dismissed in March 2012.

The district court granted KBR's motion and dismissed the complaint with prejudice on November 29, 2011, ruling that the case was related to *Duprey* and the Texas action. The court also found that *Duprey* was "pending" for purposes of the first-to-file bar, because it had not been dismissed at the time Carter 2011 was filed. The court considered whether the Texas action was also "pending" as to bar *Carter 2011*, but ultimately concluded that it need not decide the issue because at least one case—*Duprey*—was pending. The district court also held that *Carter 2011* had been filed beyond the FCA's six-year statute of limitations and would be time barred should it be refiled. Because of this reason, the court dismissed the case with prejudice. The district court further held that Carter's action was not tolled by the WSLA. The district court held that the WSLA does not apply to claims under the FCA brought by private relators. Finding ample grounds to dismiss the action, the district court did not consider whether the complaint was barred by the public disclosure provision of the FCA. Carter timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo the district court's legal rulings, such as its granting of KBR's motion to dismiss. *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 762 (4th Cir. 2011). To the extent that the decisions below involved legal conclusions based upon factual determinations, we review the factual findings for clear error, viewing the evidence in the light most favorable to Carter. *See id.*

III.

We first address Carter's contention that the WSLA tolls his action and therefore, that his claims are not time barred under the FCA.

A.

First, as a general matter, qui tam actions must be brought within six years after the date on which the alleged violation occurred. 31 U.S.C. § 3731(b). The WSLA was enacted in 1942 to extend the time for prosecution to bring charges relating to criminal fraud offenses against the United States during times of war. Wartime Enforcement Fraud Act of 2008, S. Rep. No. 110–431, at 2. When enacted, the law applied to "offenses involving the defrauding or attempts to defraud the United States and now indictable under any existing statutes." *Dugan & McNamara, Inc. v. United States*, 127 F. Supp. 801, 802 (Ct. Cl. 1955). When amended in 1944, the phrase "now indictable" was deleted. *Id.* at 802. The WSLA was later codified, and is now to be used whenever the country is at war. *Id.*

The Fifth Circuit has determined that the WSLA has three components: "(1) a triggering clause ('When

the United States is at war the running of [the applicable statute of limitations] shall be suspended .'), (2) a suspension period ('three years'), and (3) a termination clause ('suspended until after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.')." *United States v. Pfluger*, 685 F.3d 481, 483 (5th Cir. 2012) (alterations in original) (quoting 18 U.S.C. § 3287). The Supreme Court has held that the WSLA applies only to offenses committed after the triggering clause and before the termination of hostilities. *United States v. Smith*, 342 U.S. 225, 229–30 (1952). The running of the limitations period then begins when hostilities are terminated. *Id.* at 229–30.

Prior to October 4, 2008, the WSLA provided:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

18 U.S.C. § 3287 (2006) (current version at 18 U.S.C. § 3287 (2011)). In 2008, the Wartime Enforcement of Fraud Act (WEFA) amended the WSLA to expand its times of operation to "[w]hen the United States is at war or Congress has enacted specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b))." *See* Wartime Enforcement of Fraud Act, Pub. L. No. 110–417 § 855, *codified at* 18 U.S.C. § 3287. Additionally, the suspension period was extended until "5 years after the termination of hostilities as proclaimed by a Presidential proclamation,

with notice to Congress, or by a concurrent resolution of Congress." *Id.*

Courts are in disagreement as to which version of the WSLA applies to offenses that occurred before the amendments of 2008. Additionally, courts are in conflict as to whether the pre-amendment WSLA requires a formal declaration of war or whether the authorized use of military force shall suffice.

B.

Carter contends that the conflict in Iraq in 2005 is sufficient to trigger WSLA's "at war" status under either version of the WSLA. KBR however, urges us not to apply the post-amendment WSLA because it believes that the post-amendment WSLA implicates its constitutional due process rights in that the Act may allow a statute of limitations to run indefinitely.

The question presented is the meaning of "at war" as it appears in the WSLA. As with all questions of statutory construction, we begin by examining the statute's language. "[W]hen a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Ramey v. Dir., Office of Workers' Comp. Programs*, 326 F.3d 474, 476 (4th Cir. 2003) (second alteration in original) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)) (internal quotation marks omitted). In interpreting a statute we "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 461–62 (2002).

Although the meaning of "at war" may appear unambiguous at first glance, its meaning in the context

of the WSLA is not so clear. As the Supreme Court has noted, "Congress in drafting laws may decide that the Nation may be 'at war' for one purpose, and 'at peace' for another." *Lee v. Madigan*, 358 U.S. 228, 231 (1959). Therefore, we must determine what Congress meant by "at war" in the context of the WSLA.

As an initial matter, we find it unnecessary to decide which version of the WSLA applies because we find that the Act does not require a formal declaration of war. Therefore, under either version of the Act, the United States was at war when the acts at issue occurred. We find that the Act does not require a formal declaration of war for several reasons. First, had Congress intended the phrase "at war" to encompass only declared wars, it could have written the limitation of "declared war" into the Act as it has in numerous statutes. *See, e.g.*, 28 U.S.C. § 2416(d) (tolling provision for civil claims by the United States seeking money damages applies only when "the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States."); 50 U.S.C. § 1829 ("Notwithstanding any other provision of law, the President, through the Attorney General, may authorize physical searches without a court order to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress.").

Next, we believe that requiring a declared war would be an unduly formalistic approach that ignores the realities of today, where the United States engages in massive military campaigns resulting in enormous expense and widespread bloodshed without declaring a formal war. In fact, the United States has

not declared war since World War II. However, there have been extensive military engagements in Vietnam, Korea, Kosovo, Afghanistan, and twice in Iraq. Indeed, the Supreme Court has found that the laws of war apply to non-declared wars, for example the war in Afghanistan. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (holding that the detention of enemy combatants during conflicts is an incident of the rules of war). Surely these circumstances result in situations in which fraud can easily be perpetuated against the United States just as much as a formally declared war. The purpose of the WSLA—to combat fraud at times when the United States may not be able to act as quickly because it is engaged in "war"—would be thwarted were we to find that the United States must be involved in a declared war for the Act to apply. *See generally* Wartime Enforcement Fraud Act of 2008, S. Rep. No. 110–431, at 1–3.

With these principles in mind, we now address the specific conflict in Iraq. On October 11, 2002, Congress authorized the President to use military force to "defend the national security of the United States against the continuing threat posed by Iraq" and "enforce all relevant United Nations Security Council resolutions regarding Iraq." Authorization for the Use of Military Force against Iraq (AUMF), Pub. L. 107–243, 116 Stat. 114 (2002). Although not a formal recognition of war, the AUMF signaled Congress's recognition of the President's power to enter into armed hostilities. Based on the foregoing analysis, we find that the United States was "at war" in Iraq from the date of the AUMF issued by Congress on October 11, 2002.

We now turn to when—and if—the hostilities in Iraq terminated. The Fifth Circuit recently considered this issue in *Pfluger*, 685 F.3d 481. There the court determined that termination clause of the WSLA required compliance with the formal requirements set out in the clause because the language of the clause was plain and unambiguous. *Id.* at 485. We agree. The pre-amendment and post-amendment WSLA both specify that termination shall not occur until the Act's formalities have been met. In the pre-amendment WSLA, termination occurs when "proclaimed by the President or by a concurrent resolution by Congress." 18 U.S.C. § 3287 (2006). In the post-amendment WSLA, termination happens when "proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." 18 U.S.C. § 3287 (2011). Neither Congress nor the President had met the formal requirements of the Act for terminating the period of suspension when the claims at issue were presented for payment. We therefore conclude that the United States was at war during the relevant time period for purposes of the WSLA.

C.

KBR next argues that the WSLA does not apply to Carter's claims because the WSLA by its plain terms applies only to criminal cases. KBR bases its argument on the language in the statute that states it applies to "offense[s] involving fraud" and reasons that "offense" ordinarily means only crimes. 18 U.S.C. § 3287. Resolution of this issue requires us to interpret the meaning of "offense" as used in the WSLA.

In *Dugan & McNamara*, 127 F. Supp. at 802–04, the court examined both the legislative history of the

Act and the meaning of "offense." The court reasoned that the term "offense" in the 1942 version referred only to criminal penalties. *Id.* However, when amended in 1944, the phrase "now indictable" was deleted. The WSLA was then applicable to all actions involving fraud against the United States. *Id.* at 802 ("The 1942 statute with the phrase 'now indictable' spoke clearly of only criminal *180 offenses. The 1944 enactment deleted that phrase. This deletion leads us to the conclusion that the Suspension Act then became applicable to all actions involving fraud against the United States . "). Further, all but one court, *United States v. Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), *rev'd on other grounds*, 207 F.2d 796 (5th Cir. 1953), to have considered the issue of whether the WSLA applies to civil claims have found that it applies. *See, e.g., United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954); *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956); *United States v. BNP Paribas*, 884 F. Supp. 2d 589 (S.D. Tex. 2012).

Had Congress intended for "offense" to apply only to criminal offenses, it could have done so by not deleting the words "now indictable" or it could have replaced that phrase with similar wording. However, Congress did not include any limiting language and it is our opinion that in failing to do so it chose for the Act to apply to all offenses involving fraud against the United States. Therefore, because we find the text of the WSLA, the 1944 amendments, and the legislative history persuasive, we find that the WSLA applies to civil claims.

D.

The district court found that even if the WSLA was applicable to civil cases, it remains inapplicable to actions where the United States is not a party. The district court relied on this Court's decision in *United States ex rel. Sanders v. North American Bus Industries Inc.*, 546 F.3d 288 (4th Cir. 2008), for support that the WSLA includes actions brought only by the United States. This Court held in *Sanders* that 31 U.S.C. § 3731(b)(2), a special statutory extension of the FCA's statute of limitations, was available only to the government. *Id.* at 293. *Sanders*'s reasoning is further supported by the fact that the FCA has a statute of limitations that applies specifically to relators. 31 U.S.C. § 3731(b)(1). The limitations period in § 3731(b)(2) starts when the government knows or should know of "facts material to the right of action." *Sanders*, 546 F.3d at 294 (quoting § 3731(b)(2)). The court reasoned:

> This language makes perfect sense when referring to an action brought by the government: the limitations period is based on the government's knowledge of 'facts material to the right of action' because that particular knowledge notifies the government that it has an actionable FCA claim. But applying the statute's language to a relator's action makes no sense whatsoever.

Id. at 294 (quoting § 3731(b)(2)). Unlike in *Sanders*, whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case.

As such the district court's reliance on *Sanders* was misguided.

Courts are "authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress." *Murkeldove v. Astrue*, 635 F.3d 784, 793 (4th Cir. 2011) (quoting *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 451 (5th Cir. 2008)) (internal quotation marks omitted). *Sanders* follows this logic, but this principle does not exclude relator-initiated actions from the ambit of the WSLA. Including such actions does not lead to "absurd results" nor "defeat the intent of Congress." *See id.* In fact, including civil claims furthers the WSLA's purpose: to root out fraud against the United States during times of war. *See generally* Wartime Enforcement Fraud Act of 2008, S. Rep. No. 110–431, at 2–5. The district court's reasoning for relying on *Sanders* was that if the WSLA applied to a relator's claims this would "allow fraud [claims] to extend perhaps indefinitely." This is incorrect. The WSLA tolls the applicable period for a specified and bounded time while the country is at war. By offering this rationale, it appears the court was critiquing the purpose of the WSLA itself and not providing a valid basis for excluding relator-initiated claims from the WSLA. Accordingly, we are unpersuaded that relator-initiated claims are excluded from the ambit of the WSLA. Thus, Carter's action is not time barred.

IV.

We next consider KBR's argument that the FCA's first-to-file bar prohibits Carter's case from proceeding.

A.

The FCA prescribes penalties for claims submitted to the government that are known to be false. While encouraging citizens to act as whistleblowers, the Act also seeks to prevent parasitic lawsuits based on previously disclosed fraud. *See United States ex rel. St. John LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3d Cir. 1998). To reconcile these conflicting goals, the FCA has placed jurisdictional limits on its qui tam provisions, including § 3730(b)(5)'s first-to-file bar and § 3730(e)(4)'s public disclosure provision.

Under the first-to-file bar, if Carter's claims had been previously filed by another relator, then the district court lacked subject matter jurisdiction. By the same token, the public disclosure bar prevents a relator from bringing an action if the matters therein have already been made public knowledge, except if the person is an original source of the information. Although the provisions promote the same goals, they have different requirements. Here the district court ruled on the first-to-file bar and did not consider the public disclosure bar. Because of this, we begin with the first-to-file bar.

B.

KBR argues that *Duprey* and the Texas action are related actions that deprive this Court of jurisdiction under the first-to-file bar. This Court has described the first-to-file bar as an absolute, unambiguous exception-free rule. *See United States ex rel. LaCorte v. Wagner*, 185 F.3d 188, 191 (4th Cir. 1999). Therefore, whoever wins the race to the courthouse prevails and the other case must be dismissed. The text of the rel-

evant section provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Section 3730(b)(5) is jurisdictional and if an action is later filed that is based on the facts underlying the pending case, the court must dismiss the later case for lack of jurisdiction. *See Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

In determining whether a complaint is similar enough as to be caught by the first-to-file bar, courts have applied variations of a common approach. Although the approaches vary, courts have almost uniformly rejected an "identical facts" test on the ground that the provision refers to a "related" action rather than an "identical" action. The courts also agree that differences in specifics—such as geographic location or added facts—will not save a subsequent case. The Third, Fifth, Sixth, Ninth, Tenth, and D.C. circuits have all adopted a "same material elements test." *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1183 (9th Cir. 2011); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009); *Walburn*, 431 F.3d at 971; *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279–1280 (10th Cir. 2004); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217–218 (D.C. Cir. 2003); *LaCorte*, 149 F.3d at 232–33.

Under this test, a later suit is barred if it is based upon the "same material elements of fraud" as the earlier suit, even though the subsequent suit may "incorporate somewhat different details." *Lujan*, 243

F.3d at 1189. "[T]he test prevents the less vigilant whistle-blower from using insignificant factual variations to allege what is essentially the same fraudulent scheme already made known to the government." *United States ex rel. Folliard v. Synnex Corp.*, 798 F. Supp. 2d 66, 73 (D.D.C. 2011) (quoting *United States ex rel. Batiste v. SLM Corp.*, 740 F. Supp. 2d 98, 102 (D.D.C. 2010)) (internal quotation marks omitted). We find our sister circuits' reasoning persuasive, and we join these circuits in adopting the "material elements test."

C.

We shall now apply the material elements test to determine whether Carter's action is barred by either *Duprey* or the Texas action. The allegations in *Duprey*, the Texas action, and herein are substantially similar. All allege that KBR had a systematic practice of overbilling the government for hours worked by their employees. The employees were instructed to complete their time sheets without regard to the number of hours that were actually worked. These allegations of fraud provide the government with enough knowledge of essential facts of the scheme to discover related fraud. The government would likely investigate billing practices across the company, because *Duprey* notes that the official national policy was to bill correctly but that the employees were consistently instructed not to do so.

Carter seeks to distinguish his action by pointing out that the other relators worked in different divisions and were truck drivers, whereas he was a ROWPU employee. We are unpersuaded that these distinctions are material. *Duprey* and the Texas action both allege a broad scheme that encompasses the

time and location of Carter's action. Even though the fraud did occur via different types of employees and in different divisions, this is insufficient to demonstrate that the scheme Carter alleges is different from the one *Duprey* and the Texas relators allege. As the Fifth Circuit noted, "a relator cannot avoid § 3730(b)(5)'s first-to-file bar by simply adding factual details or geographic location to the essential or material elements of a fraud claim." *Branch Consultants*, 560 F.3d at 378. Here the fraud alleged—submission of false time sheets in support of claims for false payment—is the same in all of the complaints. Thus, Section 3730(b)(5)'s goal of preventing parasitic qui tam lawsuits would not be furthered if all three actions were allowed to proceed on the same essential claims.

D.

Carter argues that regardless of the relatedness of his complaint to the other cases, the other cases cannot continue to have a preclusive effect on his action. Carter argues that because the *Duprey* and Texas action have been dismissed neither can be deemed a "pending action" under § 3730(b)(5).

Following the plain language of the first-to-file bar, Carter's action will be barred by *Duprey* or the Texas action if either case was pending when Carter filed suit. The *Duprey* action was filed in 2007, and voluntarily dismissed in October 2011, after the relator failed to serve the complaint on the defendants. The Texas action was filed in 2007 and voluntarily dismissed in March 2012, when the government declined to intervene. Therefore, both actions were pending when Carter filed his complaint on June 2, 2011. Because we look at the facts as they existed

when the claim was brought to determine whether an action is barred by the first-to-file bar, we conclude that Carter's claims are barred by the *Duprey* and Texas actions. However, this does not end our inquiry.

Carter alleges that the district court erred when it dismissed his complaint with prejudice on the ground that his action was forever barred by the *Duprey* action. In *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 365 (7th Cir. 2010), the Seventh Circuit reviewed a complaint that was dismissed with prejudice because of a pending case. The court reasoned that once the initial complaint was no longer pending, the bar of § 3730(b)(5) was inapplicable and Chovanec was "entitled to file a new *qui tam* complaint." *Id.* at 365. However, if a case is brought while the original case is pending it must be dismissed "rather than left on ice." *Id.* at 362. Although the doctrine of claim preclusion may prevent the filing of subsequent cases, § 3730(b)(5) does not. This is especially true when the original case is dismissed on reasons other than the merits or dismissed without prejudice. *Id.* at 362. Because Chovanec was entitled to file a new complaint, the proceeding should have been dismissed without prejudice. *Id.* at 365.

Similarly the Tenth Circuit has explained why an action that is no longer pending cannot have a preclusive effect for all future claims. *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963–64 (10th Cir. 2009). The court reasoned, "if that prior claim is no longer pending, the first-to-file bar no longer applies." *Id.* at 964. "The 'pending' requirement much more effectively vindicates the goal of encouraging

relators to file; it protects the potential award of a relator while his claim remains viable, but, when he drops his action another relator may pursue his own." *Id.*

We agree that once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case. In this case, both of the original actions have been dismissed. Because of this, the first-to-file bar does not preclude Carter from filing an action. The first-to-file bar allows a plaintiff to bring a claim later; this is precisely what a dismissal without prejudice allows a plaintiff to do as well. Therefore, Carter's only impediment at the moment is the district court's dismissal with prejudice. And, as we have already concluded the district court erred in dismissing Carter's complaint with prejudice.

V.

KBR argues that this Court should affirm the dismissal of Carter's complaint on the alternative ground of the FCA's public disclosure provision. As noted previously, the public disclosure bar removes subject matter jurisdiction for FCA claims that are based upon matters that have been disclosed publicly, unless the relator was the original source of the allegations. KBR alleges that Carter was not the original source of the information, and that he gathered the information from another KBR employee. The district did not reach this argument, having found grounds for dismissal elsewhere. We decline to address this issue for the first time on appeal. Because the district court should have the opportunity in the first instance to address the facts relevant to public disclosure, we remand this issue to the district court.

VI.

For the foregoing reasons we reverse the district court's dismissal of Carter's complaint. Rather than address the alternative ground of the public disclosure bar for the first time on appeal, we remand this issue to the district court for further consideration.

REVERSED AND REMANDED

WYNN, *Circuit Judge*, concurring:

I fully concur in the fine majority opinion. I write separately to address what appears to be the heart of the dissent's objections: that applying the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, to the False Claims Act, 31 U.S.C. §§ 3729–33, actions in which the United States is not plaintiff or intervenor is unwise because doing so is contrary to the policy of strictly construing statutes of limitations and the goals of the False Claims Act. In particular, the dissent expresses concern that our decision will allow the False Claims Act limitations period to "extend indefinitely" and, consequently, will incentivize private plaintiffs to delay filing their claims to maximize their potential recovery. *Post* at 194 n. 6, 193–94. Because it is not our place to second-guess Congress's clearly expressed policy decisions, I respectfully disagree with the dissent.

When interpreting a federal statute, the "cardinal rule is that the intent of [Congress] is to be given effect." *NLRB v. Wheeling Elec. Co.*, 444 F.2d 783, 787 (4th Cir.1971). Typically, we ascertain Congressional intent from the plain language of the statute. *Id.* If the plain language of the statute unambiguously expresses Congress's intent, our inquiry comes to an end, even if we disagree with the policy embraced

by the statutory language. *In re Sunterra Corp.*, 361 F.3d 257, 269 (4th Cir. 2004). For, as the Supreme Court has explained,

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.

Tenn. Valley Authority v. Hill, 437 U.S. 153, 194–95 (1978).

Here, as the majority correctly concludes and the dissent tacitly acknowledges, the plain language of the Wartime Suspension of Limitations Act extends the limitation period for "any offense" of fraud against the United States during a time of war. 18 U.S.C. § 3287. No doubt recognizing that it is not our role to question Congress's clearly expressed policy determinations, the dissent relies on strained readings of the Wartime Suspension of Limitations Act and our precedent in an attempt to argue that, under the plain language of the Wartime Suspension of Limitations Act, the term "any offense" does not encompass False Claims Act actions in which the government is not a party.

First, the dissent appeals to our decision in *United States ex rel. Sanders v. North American Bus Industries, Inc.*, in which we held that the False Claims Act limitations period tolling provision, 31 U.S.C. § 3731(b)(2), does not apply to False Claims Act actions in which the government is not a party. 546

F.3d 288, 293. Section 3731(b)(2) provides that the standard six-year False Claims Act limitations may be tolled until "no more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." In *Sanders*, we reasoned that Section 3731(b)(2) does not toll the limitations period for private False Claims Act actions because it would make little sense to have a suit's limitations period turn on the knowledge of an entity that is not party to the action. 546 F.3d at 293.

The majority opinion correctly notes that *Sanders* is inapposite because it involved an entirely different statute, which includes express language that supports distinguishing between False Claims Act actions where the government is and is not a party. *Ante*, at 180–81. Nevertheless, the dissent tries to analogize the Wartime Suspension of Limitations Act to Section 3731(b)(2), which was at issue in *Sanders*, by asserting that federal government conduct controls the limitations periods set out in both statutes. In particular, the dissent notes that

> [b]y the terms of the [Wartime Suspension of Limitations Act], the government is solely entitled to invoke and terminate the tolling provisions of the statute. The private *qui tam* plaintiff has no connection with these decisions and it seems odd to conclude that such a private plaintiff should be entitled to the same limitations period as the necessary actor, the government. There is no such clear statutory direction.

Post at 191. But Congress does not "invoke" the Wartime Suspension of Limitations Act. Rather, the Wartime Suspension of Limitations Act becomes effective when Congress declares war or authorizes the use of military force. The invocation of the Wartime Suspension of Limitations Act is at most a tertiary consideration in Congress's decision to declare war or authorize the use of military force, and thus there is only a de minimus relationship between the government conduct discussed in the Wartime Suspension of Limitations Act and any particular False Claims Act claim. By contrast, with Section 3132(b)(2) the connection between the relevant government conduct and a particular False Claims Act claim is quite close, because whether Section 3132(b)(2) tolls the limitations period turns on the government's knowledge of the alleged fraudulent conduct at issue in the particular False Claims Act claim.

The dissent also places great weight on the fact that both the Wartime Suspension of Limitations Act and its legislative history are silent regarding *qui tam* relators in False Claims Act actions, arguing that this silence "strongly suggests that Congress did not intend the tolling provisions of the statute to reach indiscriminately to any private plaintiff pursuing a claim for fraud against the government." *Post* at 193, 194. Yet the Supreme Court has admonished courts to tread carefully in attempting to find meaning in statutory silence because such silence is frequently amenable to multiple interpretations:

> Not every silence is pregnant. In some cases, Congress intends silence to rule out a particular statutory application, while in others Congress' silence signifies merely an expectation

> that nothing more need be said in order to effectuate the relevant legislative objective. An inference from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.

Burns v. United States, 501 U.S. 129, 136 (1991) (quotation omitted), abrogated on other grounds by *United States v. Booker*, 543 U.S. 220 (2005). Here, finding meaning in the Wartime Suspension of Limitations Act's silence is improper because the silence just as reasonably can be interpreted as indicating that Congress did not intend to distinguish between False Claims Act actions by private plaintiffs and those in which the government is a party as it can be interpreted as excluding actions by private relators from the ambit of the Wartime Suspension of Limitations Act, as the dissent does.

Moreover, Congress's decision not to clarify the scope of "any offense" when amending the Wartime Suspension of Limitations Act in 2008 in the face of numerous decisions broadly interpreting "offense" in the Wartime Suspension of Limitations Act casts further doubt on the dissent's appeal to statutory silence. A canon of statutory construction is that "[w]e presume that when Congress amends a statute, it is knowledgeable about judicial decisions interpreting the prior legislation." *Porter v. Bd. of Trustees of Manhattan Beach Unified School Dist.*, 307 F.3d 1064, 1074 (9th Cir. 2002); *see also United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) ("It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law; that is with the

knowledge of the interpretation that courts have given to an existing statute.").

Congress amended the Wartime Suspension of Limitations Act in 2008 to broaden its scope by lengthening the tolling period and clarifying that the statute applies to Congressional authorizations of the use of military force as well as declared wars. *See* Wartime Enforcement of Fraud Act, Pub.L. No. 110–417 § 855, *codified at* 18 U.S.C. § 3287. Notably, the amendment did not in any way alter, narrow, or circumscribe the scope of the term "any offense." By the time of the 2008 amendment, numerous courts had held that the term "offense" in the earlier version of the Wartime Suspension of Limitations Act encompassed civil fraud claims, including False Claims Act cases, *see, e.g.*, *United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954); *United States v. BNP Paribas*, 884 F. Supp. 2d 589, 602–05 (S.D. Tex. 2012), and the only court to address whether the Wartime Suspension of Limitations Act applies to non-intervened False Claims Act actions had determined that it did, albeit in dicta, *United States ex rel. McCans v. Armour & Co.*, 254 F.2d 90, 90 (D.C. Cir. 1958). We must presume that Congress was aware of these interpretations when it amended the Wartime Suspension of Limitations Act in 2008, and its decision not to amend the statute to exclude, or even discuss, False Claims Act actions, let alone non-intervened False Claims Act actions, in the face of this precedent suggests that it agreed with, or at least acquiesced in, these judicial decisions. In such circumstances, Congress's silence favors the majority's reading, rather than undermining it.

Thus, neither of the dissent's rationales for reading ambiguity into the plain language of the statute is persuasive. Therefore, we are left to conclude that when Congress said "any offense," it meant *any* offense, including offenses raised by private False Claims Act relators. Because the plain language of the Wartime Suspension of Limitations Act indicates that Congress intended the statute to apply to non-intervened False Claims Act actions, it is not our place to question the wisdom of this policy decision. *Hill*, 437 U.S. at 194–95.

Even if the plain language of the Wartime Suspension of Limitations Act would allow us to consider the policy concerns highlighted by the dissent—that our decision will "extend indefinitely" the limitations period for False Claims Act claims and will encourage would—be relators to delay filing their claims—I am not convinced that either concern is justified. First, the Wartime Suspension of Limitations Act tolls the limitations period for fraud actions for a bounded period of time: the time during which the country is at war or otherwise engaged in a military conflict. 18 U.S.C. § 3287. Moreover, even if the informal nature of modern military conflicts renders the limitations period established by the Wartime Suspension of Limitations Act somewhat less definite, it is within Congress's purview to determine that certain conduct is sufficiently egregious—such as defrauding the government during a time of war—that an extended or indefinite limitations period is warranted. Indeed, Congress has elected to entirely do away with limitations periods for many federal crimes. *See* Charles Doyle, Cong. Research Serv., RL 31253, *Statutes of Limitation in Federal Criminal Cases: An Overview* 18–24 (2012).

Second, any concern that our holding will encourage relators to sit on their claims in order to maximize recovery is alleviated by the False Claims Act's public disclosure and first-to-file bars, which preclude a would-be relator from bringing a claim that is based on information that has already been publicly disclosed or that is "related" to a pending action. See 31 U.S.C. §§ 3720(e)(4), 3730(b)(5). Regardless of the applicability of the Wartime Suspension of Limitations Act, False Claims Act relators have an incentive to bring actions as early as possible to avoid having their claims dismissed under either of these two provisions.

In sum, the majority correctly concludes that the plain language of the Wartime Suspension of Limitations Act unambiguously encompasses False Claims Act actions in which the government is not a party. It is not this Court's—or any court's—place to revisit Congress's clearly articulated policy determinations, even when we feel they are unwise. If, after reviewing our decision, Congress agrees with the dissent that limiting the Wartime Suspension of Limitations Act to False Claims Act actions in which the government is a party is the best policy, it is free to amend the statute, as it did in 2008. Until that point, however, we are required to give effect to Congress' intent, as expressed through the plain and unambiguous language of the Wartime Suspension of Limitations Act, that the tolling applies to "any offense." *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S. Ct. 1605, 1624 (2010) ("To the extent Congress is persuaded that the policy concerns identified by the dissent require a recalibration of [a statute], it is, of course, free to amend the statute accordingly. This court may not, however, read more in-

to [a statute] than the statutory language naturally supports.").

AGEE, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the majority opinion that the "first-to-file" rule does not act as a barrier to Benjamin Carter's *qui tam* action against Halliburton, Kellogg Brown & Root, and Service Employees International (collectively "KBR"). However, I do not agree with the holding in the majority opinion, principally section III D, that the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, tolls the six-year limitations period set forth in the False Claims Act ("FCA"), 31 U.S.C. § 3731(b)(1), when the United States is not the plaintiff or an intervenor. For that reason, I respectfully dissent from the majority opinion insofar as it would allow Carter to proceed on those of his claims that fall outside the six-year FCA limitations period.

I.

Pursuant to 31 U.S.C. § 3731(b)(1), a civil action under the FCA may not be brought more than six years after the date on which the alleged violation was committed. In this case, the vast majority of Carter's claims against KBR stem from violations that allegedly took place before May 1, 2005.[1] Pursuant to § 3731(b)(1), therefore, Carter had until May 1,

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[1] Carter alleges that KBR fraudulently submitted one voucher to the United States, totaling $673.56, on June 15, 2005. Because this was within six years of the filing of Carter's complaint in 2011, Carter's FCA claim related to that voucher is timely.

2011, to file his *qui tam* complaint against KBR for it to be deemed timely. The latest iteration of Carter's complaint, however, was not filed until June 2, 2011. Thus, absent tolling, in some form, the bulk of Carter's claims are barred by the FCA's limitations period because they did not take place within six years of the filing of the complaint.[2]

In 1942, Congress unanimously approved the first version of the WSLA, which temporarily suspended the statute of limitations in criminal contracting fraud cases arising out of the Second World War. *See* Act of August 24, 1942, 56 Stat. 747. Congress amended the WSLA in 1948, and the majority concludes that the effect of those amendments was to extend the reach of the WSLA to civil limitations periods, not merely those arising in the criminal fraud context. See Act of June 25, 1948, 62 Stat. 683, 828. The majority may be correct, but the issue is not without doubt.[3]

In 2011, at the time Carter filed his complaint, the WSLA provided:

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[2] In addition to seeking to avail himself of tolling pursuant to the WSLA, Carter argued before the district court and on appeal that he is entitled to the benefit of equitable tolling. Although observing that his equitable tolling claim was improperly before the court, the district court alternatively held that "Carter cannot show that the instant suit is untimely due to circumstances external to his own conduct, and equitable tolling is inappropriate." (J.A. 620 n.11). I agree with the district court that equitable tolling is unavailable to Carter.

[3] Because I would hold that the WSLA does not apply in this case, I would merely assume, without deciding, that the WSLA applies to civil actions generally.

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces.

18 U.S.C. § 3287.[4]

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[4] The majority opinion does not reach the question of whether the pre- or post–2008 version of the WSLA applies to Carter's *qui tam* complaint. *Ante* at 177–78. If the WSLA applies to this case at all (and I believe that it does not), it seems most likely that the post–2008 version of the statute would apply. This is so because the amendments at issue concern the limitations period

Carter argues that, by operation of the WSLA, the FCA limitations period was suspended in 2005, at the time KBR submitted allegedly false claims to the United States for payment. Accordingly, Carter posits (and the majority opinion agrees) that the WSLA precludes KBR from asserting the statute of limitations as a defense in this case. For reasons explained below, I do not agree with that construction of the WSLA.

II.

A.

This appeal presents a quintessential question of statutory interpretation, which we review de novo. *In re Maharaj*, 681 F.3d 558, 568 (4th Cir. 2012).

"As in all cases of statutory interpretation, our inquiry begins with the text of the statute." *Chesapeake Ranch Water Co. v. Bd. of Comm'rs of Calvert Cnty.*, 401 F.3d 274, 279 (4th Cir. 2005). "In that regard, we must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute and our inquiry must cease

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for FCA actions and not the underlying conduct at issue. See *Forest v. USPS*, 97 F.3d 137, 140 (6th Cir. 1996) (new statute of limitations has prospective application because it applies to the filing of a complaint, which occurred after the statute was enacted); but see Chenault v. USPS, 37 F.3d 535, 539 (9th Cir. 1994) ("[N]ewly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme.").

Thus, for purposes of this dissent, I will assume that if any version of the WSLA applies, it is the version as amended in 2008.

if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *United States v. Bly*, 510 F.3d 453, 460 (4th Cir. 2007) (quoting *United States v. Hayes*, 482 F.3d 749, 752 (4th Cir. 2007) (omission in original)). "We determine the 'plainness or ambiguity of the statutory language by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' " *United States v. Thompson–Riviere*, 561 F.3d 345, 354–55 (4th Cir. 2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (omission in original)).

B.

I note at the outset that no case has ever held (other than in dicta) that the WSLA applies to civil cases where the United States is not a plaintiff or intervenor in the *qui tam* action. In the only case in which a court suggested the WSLA did so apply, *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), the court's conclusion was not the *ratio decendi* of the decision and was clearly dicta. In *McCans*, the relator brought a *qui tam* complaint against Armour & Co., a government contractor, alleging that Armour sold certain pork products to war procurement agencies at prices in excess of limitations set by Congress during World War II. Although the allegedly illegal sales were conducted between 1942 and 1943, the relator did not file her complaint until 1954. While the district court discussed the application of the WSLA tolling provisions to the relator's complaint, it concluded that the complaint was not timely filed, even if WSLA tolling were applicable. *Id.* at 551. Any discussion of WSLA tolling in *McCans* was thus clearly unnecessary to the dis-

trict court's holding that the suit was untimely. Accordingly, the court's references to the WSLA's applicability to private plaintiffs is mere dicta. *See Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 373 (4th Cir. 2011) ("This additional observation was not necessary to the Court's resolution of the issue that was the basis of its holding, and we therefore conclude that the observation is merely dicta."); *Bettius & Sanderson, P.C. v. Nat'l Union Fire Ins. Co.*, 839 F.2d 1009, 1019 n. 3 (4th Cir. 1988) (Murnaghan, J., concurring in part and dissenting in part) ("To reach out and decide what need not be decided is frequently denigrated as *dictum*.").

C.

As there is no direct authority for application of the WSLA here, I find the reasoning in *United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288 (4th Cir. 2008), a persuasive guide to our disposition of this issue. *Sanders* concerned the construction of 31 U.S.C. § 3731(b), the FCA's limitations provisions; the same statute providing the statute of limitations in this case. That statute provides that

> [a] civil action under [the FCA] may not be brought—
>
> (1) more than 6 years after the date on which the violation of [the FCA] is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in

> no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b). The Sanders relator, whose complaint was filed beyond the six-year limitations period described in § 3731(b)(1), sought to avail himself of § 3731(b)(2), which runs the limitations period from the time the United States receives (or reasonably should receive) notice of the violation. We rejected that attempt.

Although we observed that § 3731(b) applied to "civil action[s]" under the FCA, we held that the language of § 3731(b)(2) could only be logically applied when referring to an action brought by the United States, not by a private relator. *Id.* at 294. In support of this holding we reasoned that "applying the statute's language to a relator's action makes no sense whatsoever. The government's knowledge of 'facts material to the right of action' does not notify the relator of anything, so that knowledge cannot reasonably begin the limitations period for a relator's claims." *Id.*

The *Sanders* court also made important observations about the practical effect of allowing a private relator to claim the benefit of a statutory limitations period intended for the benefit of the government. It noted that extending the limitations period for up to 10 years (the outer limit provided by § 3731(b)(2)) in the case of a private relator would create incentives contrary to the purposes of the FCA. *Id.* at 295. "[R]elators would have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recov-

ery." *Id.* Critically, the court went on to note that the relator's proposed construction would undermine the very purpose of the *qui tam* provisions of the FCA: "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not." *Id.*

Following the reasoning of *Sanders* in the instant case, I agree with the holding of the district court that application of the WSLA to a suit brought by a private relator is inconsistent with the WSLA and its legislative history and would be contrary to the articulated goals of the FCA. Let me explain why that is so.

At first blush, Carter is correct that the WSLA applies to "any offense," involving fraud against the United States (obviously, when certain conditions are met). But to read "any offense" as encompassing actions by private relators is a superficial reading of the WSLA and fails to construe the statute in context. By the terms of the WSLA, the government is solely entitled to invoke and terminate the tolling provisions of the that statute, however, the text of the WSLA is entirely silent as to private relators. The triggering and terminating provisions of the WSLA are both related to and solely controlled actions of the United States government: declaration of war or congressional authorization for use of military force (to trigger) and congressional resolution or Presidential proclamation (to terminate). In either circumstance, Congress and the President possess the unique power to invoke the WSLA to toll the limitations period for fraud offenses: a period when the same government is thus released from a looming time bar to bring an FCA claim. The private qui tam plaintiff has no connection with these

decisions and it seems odd to conclude that such a private plaintiff, absent a clear statutory direction, should be entitled to the same limitations period as the necessary actor, the government. There is no such clear statutory direction.

In *Sanders*, we declined to find that the private party relator could latch onto the § 3731(b)(2) exception since the relator was neither mentioned in the statute or legislative history as authorized to do so. Similarly, here with the WSLA, we find no mention of the private party relator in the statute or its legislative history: again, an odd basis upon which to extend the tolling of a statute of limitations which is to be strictly construed. *See Bridges v. United States*, 346 U.S. 209, 215–16 (1953) (holding that, because the WSLA is an exception to the "longstanding congressional policy of repose," it is "to be liberally interpreted in favor of repose").

Simply reading "any offense" to encompass all offenses regardless of whether the United States is the plaintiff, is inconsistent with the nuanced approach that courts have employed when reading the "civil action" language in § 3731(b). We reasoned in *Sanders* that "a civil action" should not be read to encompass all FCA actions, but rather, should be read in context to include only those actions brought by the United States. *Sanders*, 546 F.3d at 294–95. Here, the WSLA (like § 3731(b)(2)) mentions the United States, not private relators. Thus the text of the WSLA, on its own, supports the proposition that only the United States may take advantage of its tolling provisions. Nevertheless, I also find that this interpretation is consistent with the purposes and legislative history of the WSLA.

D.

The Supreme Court has described the rationale underlying the passage of the WSLA during World War II as follows:

> The fear was that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late. The implicit premise of the legislation is that the frenzied activities, existing at the time the Act became law, would continue until hostilities terminated and that until then the public interest should not be disadvantaged.

United States v. Smith, 342 U.S. 225, 228–29 (1952); *see also id.* at 230 (Clark, J., concurring) ("Soon after the beginning of World War II, Congress realized that it would be impossible for the Department of Justice currently to investigate and prosecute the large number of offenses arising out of the war effort. Therefore Congress suspended the running of the statute of limitations as to frauds against the Government. It is clear that Congress intended to give the Department more time to apprehend, investigate, and prosecute offenses occurring 'under the stress of present-day events' of the war.").

In other words, the Court recognized that the primary concern motivating Congress in passing the WSLA was the ability of law enforcement to effectively police fraud against the government during the fog of war. *See, e.g.*, 21 Am. Jur. 2d *Criminal Law* § 264 (2013) ("The purpose of the [WSLA] is to give *government law enforcement officials* additional time to

discover and punish offenses related to the commercial aspect of war programs, where extensive war efforts render them unable to deal with those offenses within the normal period of limitation." (emphasis added)). This concern is evident in the WSLA's legislative history.

> During normal times the present 3–year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

Bridges, 346 U.S. at 217 n. 18 (quoting S. Rep. No. 1544, 77th Cong. 2d Sess.). Once again, the concern of Congress, as expressed in the legislative history, was the inability of the Department of Justice and other federal law-enforcement entities to effectively prevent and prosecute fraud in light of other duties antecedent to waging war. The legislative history makes no

mention of private plaintiffs bringing relator actions against those allegedly engaged in fraud.

The legislative history of the Wartime Enforcement of Fraud Act of 2008 ("WEFA"), Pub. L. No. 110–417 § 855, which contained the most recent amendments to the WSLA, reveals that the same concerns motivated Congress in passing the 2008 amendments to the WSLA. In sending the WEFA to the full Senate, the Judiciary Committee report repeatedly emphasized the difficulty of investigators, auditors, and the Department of Justice in ferreting out fraud against the United States during the conflicts in Iraq and Afghanistan. *See* S. Rep. No. 110–431. Again, the legislative history is silent with respect to private party relators.

The purpose of the WSLA (as articulated by the Supreme Court) and the legislative history of that statute confirm what the text reflects: that Congress was concerned with the ability of the federal government to police fraud when the resources of its law enforcement were stretched thin by war. Tolling afforded law enforcement the ability to thoroughly investigate allegations of fraud without compromising the ability of the United States to fulfill its military mission. Unlike federal law enforcement, private relators are not "busily engaged in many duties, including the enforcement of the espionage, sabotage, and other laws." *Bridges*, 346 U.S. at 217 n. 18 (quoting S.Rep. No. 1544). And extending the benefits of tolling to private relators does not "afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government." *Id.* In sum, Congress has shown no intent

to toll the FCA's limitations period when the United States is not a plaintiff to the FCA action.

The complete silence as to relators in the legislative history of the WSLA is all the more telling when one considers that the FCA, which was originally passed in 1863, was on the books when the Congress considered the WSLA in 1942 and the WEFA in 2008. "Faced with statutory silence, we presume that Congress is aware of the legal context in which it is legislating." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334 n. 4 (4th Cir. 2008) (quoting *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1017–18 (9th Cir. 2007) (internal alterations omitted)). Thus, the fact that Congress did not mention qui tam plaintiffs in the legislative history of any version of the WSLA strongly suggests that Congress did not intend for the tolling provisions of that statute to reach indiscriminately to any private plaintiff pursuing a claim for fraud against the government.

E.

Looking finally to the policies underlying the FCA, the majority's interpretation of the WSLA is plainly at odds with the goals of the FCA. The policy concerns underlying the FCA will be directly thwarted by allowing private relators to take advantage of the WSLA's tolling provisions. In this case, for example, Carter's claims arose in 2005, and application of the WSLA would extend the limitations period for his actions well into the next decade at least, depending on the date hostilities in Iraq are deemed terminated. Assuming for the sake of argument, as the district court did, that the August 31, 2010, presidential statement of "the end of our combat mission in Iraq" was sufficient to end the tolling provisions of the

WSLA,[5] (J.A. 628 n.33.), Carter would have until 2019, nearly fourteen years after his claims accrued, to file a *qui tam* action. Before the district court, Carter argued that hostilities in Iraq have not formally ended, meaning that the limitations period would still be tolled today, seven years after the allegedly false claims were presented to the government. When (and if) hostilities are formally declared terminated in Iraq, it could be up another eleven years (five years after termination of hostilities pursuant to the WSLA, plus the normal six year limitations period prescribed in § 3731(b)(1)) before the limitations period would be deemed to have ended.[6] Such an expansive limitations period applicable to private qui tam plaintiffs is unsupported by statute, legislative history, or precedent.

In this respect, *Sanders* is again instructive, because it accurately described the differing incentive structures that motivate relators, as opposed to law

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[5] It is not clear that this declaration meets the statutory prerequisites to end tolling as a matter of law, given the requirement contained in the WSLA that the President give formal notice to Congress that hostilities are terminated. See 18 U.S.C. § 3287.

[6] The majority opinion criticizes the district court for opining that the adoption of Carter's construction of the WSLA could permit the statute of limitations "to extend perhaps indefinitely." *Ante* at 181. But it is clear from the WSLA itself that tolling will continue until either the President makes a proclamation of termination of hostilities with formal notice to Congress, or Congress passes a concurrent resolution to the same effect. The record does not conclusively reflect that either Congress or the Chief Executive have acted in the manner contemplated by the statute. If they have not done so, tolling will indeed extend indefinitely.

enforcement, in the context of FCA actions. As *Sanders* explained, a lengthy limitations period would create a "strong financial incentive" for relators to "allow false claims to build up over time before they filed, thereby increasing their own potential recovery." *Sanders*, 546 F.3d at 295. The government, on the other hand, always has an incentive to quickly act to root out fraud against the United States. The lengthy limitations period of the WSLA, therefore, is uniquely helpful to a government that is otherwise hampered from enforcing anti-fraud laws by the externalities of waging a military conflict. Applying that same lengthy limitations period to relators is uniquely problematic because doing so thwarts the whole purpose of the FCA: "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not—to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits." *Id.* (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943)) (internal quotation marks omitted).

In fact, the concern identified by *Sanders* is exacerbated in the context of wartime enforcement of anti-fraud laws. As the legislative history to the WEFA notes, "often," during war, "the Government does not learn about serious fraud until years after the fact." S.Rep. No. 110–431. In contrast, private party relators will be inclined to delay, allowing their potential recovery to increase, knowing that the government is unlikely to discover the fraud, and therefore unlikely to be the first to bring a claim against the perpetrators. Absent WSLA tolling, relators are at least restricted to a six year window in which to bring their claims. In the context of virtually indefinite WSLA tolling, however, a relator could wait a decade or

more to bring a qui tam claim, secure in the knowledge that law enforcement is otherwise too occupied with the exigencies of war to discover the fraud on its own.

F.

The majority opinion does not address the arguments set forth above, but summarily dismisses *Sanders* as inapplicable because, "whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends on whether the country is at war and not who brings the case." *Ante* at 180. This is a misreading of *Sanders*, the statute, and the legislative history. Like the WSLA, the limitations period at issue in *Sanders* did not contain an express limitation on who could take advantage of the tolling provision. Rather, the analysis in *Sanders* focused on whether § 3731(b)(2) could be plausibly read to encompass actions brought by private parties. Like § 3731(b)(2) in *Sanders*, the WSLA should be read in context, keeping in mind both the purposes of that statute and the dire effects of extending to relators a provision obviously intended only for the government.

III.

The text, the purposes, and the legislative history of the WSLA all counsel in favor of holding that the government only, and not private relators, are entitled to take advantage of that statute's tolling provisions. Because the majority takes the altogether novel step of expanding the WSLA to apply to actions by relators, I must respectfully dissent from that aspect of the majority's holding.

APPENDIX B

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

No. 1:11-cv-602 (JCC/JFA)
Dec. 12, 2011

UNITED STATES EX REL. BENJAMIN CARTER, PLAINTIFF,

v.

HALLIBURTON CO., ET AL., DEFENDANTS

Before: CACHERIS, *District Judge.*

Memorandum Opinion Under Seal [Redacted].

This matter is before the Court on Defendants Halliburton Company, KBR, Inc. ("KBR"), Kellogg Brown & Root Services, Inc. ("KBRSI"), and Service Employees International, Inc.'s ("SEII") (collectively, "Defendants"), Motion to Dismiss [Dkt. 11] and Relator Benjamin Carter's ("Relator" or "Carter") Motion for Leave to File a Sur-reply [Dkt. 29]. For the following reasons, the Court will grant Defendants' Motion to Dismiss and deny Relator's Motion for Leave to File a Sur-reply.

I. Background

A. Carter Action

The subject matter underlying this case is before the court for a third time and involves the Defendants' alleged fraudulent billing of the United States. As set forth below, this case is identical to two earlier cases dismissed by this Court and related to an earlier case filed in district court in California.

1. Carter's Allegations

In his Complaint, Carter brings a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 through 3733 (the "FCA"), alleging that Defendants falsely billed the Government for services provided to United States military forces serving in Iraq.

Specifically, Carter alleges that Defendants "knowingly presented [or caused to be presented] to an officer or employee of the United States Government false or fraudulent claims for payment or approval" in violation of 31 U.S.C. § 3729(a)(1). (Complaint [Dkt. 1] ("Compl.") ¶¶ 157–58.) Carter also alleges that "Defendants knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the Government" in violation of 31 U.S.C. § 3729(a)(2).[1] (Compl.¶ ¶ 192–93.)

These allegations stem from Carter's work as a Reverse Osmosis Water Purification Unit ("ROWPU") Operator in Iraq from mid-January 2005 until April

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[1] Section 3729(a)(1) has been re-codified at 31 U.S.C. § 3729(a)(1)(A) and section 3729(a)(2) has been re-codified at 31 U.S.C. § 3729(a)(1)(B).

2005. (Compl.¶¶ 3, 41, 69.) During that period, Carter worked at two camps, Al Asad and Ar Ramadi. (Compl.¶¶ 41–42.)

Carter alleges that "the Al Asad Defendant ROWPU employees were not engaged in any actual water purification duties on discrete dates in January 2005," but nevertheless, the "Al Asad ROWPU employees' time [was] billed under LOGCAP[2] III" as if they had been purifying water. (Compl.¶¶ 130–31.) Similarly, while working at Ar Ramadi, Carter was allegedly "required to fill in timecards stating that he worked 12 hour[s] a day, each day, with uniformity, on ROWPU functions," though during this time Carter "actually worked 0 hours per day on ROWPU functions." (Compl.¶¶ 54–55.) Carter also alleges that all "trade employees" such as he were required to submit time cards totaling "exactly 12 hours per day and 84 hours per week" and that it was their "routine practice" to do so. (Compl.¶¶ 60–61, 65, 67–68.)

In essence, Carter contends that Defendants had knowledge that at the Ar Ramadi and Al Asad camps in Iraq, ROWPU "personnel were not engaged in any water testing or purification duties in support of the LOGCAP Contract," and "Defendants were billing the Government for work that was not actually performed." (Compl. ¶¶ 163, 166 .)

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[2] As noted in this Court's May 10, 2010 Memorandum Opinion in 1:08cv1162, LOGCAP III was the Logistics Civil Augmentation Program ("LOGCAP") contract put out by the Department of Defense for civil logistical support for military operations in Iraq, Afghanistan, and other countries.

2. Procedural History

a. 2008 Carter

Carter filed an earlier case in this Court against Defendants, Civil Action No. 08cv1162 (JCC/JFA) ("2008 Carter"). In May 2010, this Court dismissed 2008 Carter without prejudice for lack of jurisdiction. (1:08cv1162 [Dkt. 307].) The Court held that 2008 Carter was barred by § 3730(b)(5) of the FCA, which bars a relator from "bring[ing] a related action based on the facts underlying [a] pending action," known colloquially as the FCA's "first-to-file bar." 31 U.S.C. § 3730(b)(5).

Relator filed 2008 Carter on February 1, 2006, in the United States District Court for the Central District of California, with a first amended complaint filed on February 10, 2006. (1:08cv1162 [Dkt. 5].) Carter 2008 was transferred to this Court on November 3, 2008. (1:08cv1162 [Dkt. 73].) This Court dismissed Carter's first amended complaint in Carter 2008 on January 13, 2009, granting leave to amend. (1:08cv1162 [Dkt. 90].) Carter filed a second amended complaint in Carter 2008 on January 28, 2009. (1:08cv1162 [Dkt. 92].)

Also of significance here is this Court's July 23, 2009 Order in Carter 2008 dismissing Counts 2 and 3 of Relator's second amended complaint in their entirety, dismissing Count 1, alleging that Defendants knowingly submitted false claims to the United States, except as it related to September 1, 2004 through April 2005 for Ar Ramadi, and during January 2005 for Al Asad, (*See* Memorandum Opinion ("Mem. Op.") at 19, 22, 1:08cv1162 [Dkt. 121] (July 23, 2009)), and dismissing Count 4, alleging that De-

fendants knowingly made or used false records or statements material to a false claim, except as it related to the time cards of the Ar Ramadi ROWPU employees from September 1, 2004 to April 2005, (*id.* at 34).

b. California Action

The first-filed "pending action" barring Carter 2008 was *United States ex rel. Thorpe v. Halliburton Co.*, No. 05cv08924 (CD. Cal.), filed on December 23, 2005 (the "California Action"). (Mem. Op. at 2, 15–19, 1:08cv1162 [Dkt. 306] (May 10, 2010).)

On March 23, 2010, in the week before Carter 2008 was set for trial, the Department of Justice ("DOJ") disclosed to the parties the existence of the California Action. Defendants moved to dismiss Carter 2008 under § 3730(b)(5)'s first-to-file bar, and this Court dismissed Carter 2008 without prejudice on May 10, 2010. (1:08cv1162 [Dkt. 307].)

After this Court dismissed Carter 2008, the California Action was dismissed on July 30, 2010. (Memorandum in Support [Dkt. 16] ("Mem.") at 4)

c. 2008 Carter Appeal

Relator filed a notice of appeal to the Fourth Circuit on July 13, 2010. (1:08cv1162 [Dkt. 325].) Carter moved to dismiss the appeal on December 14, 2010. (Mem. at 4.) The Fourth Circuit dismissed the Carter 2008 appeal on February 14, 2011. (1:08cv1162 [Dkt. 331, 332].)

d. 2010 Carter

Carter filed a second case in this Court on August 4, 2010, Civil Action No. 10cv864 (JCC/TCB) ("2010 Carter"). The Court dismissed 2010 Carter in May 2011, again holding that the case was barred by the FCA's first-to-file bar. (Mem. Op. at 10–11, 1:10cv864 [Dkt. 46] (May 24, 2011).) Specifically, the Court noted that 2010 Carter was filed while the appeal in Carter 2008—and, thus, Carter 2008 itself—was still pending. (*Id.* at 10.) Because the two cases were indisputably related, the Court dismissed 2010 Carter without prejudice. (*Id.* at 10–11, 13.)

e. The Instant Action

Carter filed this case on June 2, 2011. [Dkt. 1.] The United States declined to intervene on August 23, 2011. [Dkt. 3.] This Court unsealed the Complaint on August 24, 2011. [Dkt. 4.] Carter's complaint in this case is identical to the complaint filed in 2010 Carter and the second amended complaint filed in 2008 Carter, except for its title, case number, and signature block.

On October 21, 2011, Defendants filed a Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [Dkt. 11.] In their Motion, Defendants argue, among other things, that this case not only remains barred by the California Action, but is also barred by [REDACTED] *United States ex rel. Duprey v. Halliburton, Inc., et al.*, No. 8:07cv1487 (D. Md.) (the "Maryland Action"). [REDACTED] Carter filed an opposition to the Motion to Dismiss on November 3, 2011. [Dkt. 21.] Defendants filed their reply in support on November 8, 2011. [Dkt. 25.] Carter filed a Motion for Leave to

File a Sur-reply [Dkt. 29] on November 11, 2011, which Defendants opposed [Dkt. 35] on November 16, 2011. Carter filed a reply in support of his Motion for Leave to File a Sur-reply on November 18, 2011. [Dkt. 38.] Defendants' Motion to Dismiss and Carter's Motion for Leave to File a Sur-reply are before the Court.

B. Maryland Action

The Maryland Action alleges that Defendants "knowingly presented, or caused to be presented, to an officer or employee of the United States government, false or fraudulent claims for payment or approval, in violation of 31 U.S.C. § 3729(a)(1)." (Maryland Compl. (Mem. Ex. 4) ¶ 168.) The Maryland Relators further allege that Defendants "knowingly made, used, or caused to be made or used, a false record or statement to get false or fraudulent claims paid by the Government in violation of 31 U.S.C. § 3729(a)(2)." (Maryland Compl. ¶ 171.)

Since at least March 2003, Defendant KBR provided shipping and transportation support for the United States military in Iraq by operating a division known as the Theater Transportation Mission ("TTM") pursuant to LOGCAP III. (Maryland Compl. ¶¶ 6–7, 19–20 .) The Maryland Relator was employed by Defendant KBR as a truck driver in the TTM division and worked in Iraq from March 27, 2005 to January 15, 2006. (Maryland Compl. ¶¶ 1, 22.) The Maryland Relator alleges that his section, as well as other sections in the TTM division, inflated the hours on their time cards pursuant to an "unwritten corporate policy" requiring all TTM drivers to enter "no fewer than twelve hours of work per shift" and "to bill a minimum of eighty-four (84) hours per week, not-

withstanding the number of hours actually worked." (Maryland Compl. ¶¶ 23–26.)

In support of these allegations, the Maryland Relator specifically claims that, while "[d]ayshift missions typically ended at 1700 hours, rather than the scheduled 1930 hours it was the regular practice of drivers, convoy commanders, and foremen to include the un-worked balance of the full shift time, up to 1930 hours, on their timesheets, even when completing the shift early." (Maryland Compl. ¶ 44.) Moreover, "most dayshifts included a two (2) hour lunch break which was not deducted from the time sheet," and "drivers would frequently take a two (2) hour breakfast upon arrival at the duty location while 'on-the-clock.'" (Maryland Compl. ¶ 46.) Convoy commanders also allegedly "add[ed] unnecessary hours to the time their crew beg[an] preparations for the mission." (Maryland Compl. ¶ 48.) Similar time card fraud allegedly occurred during night shifts. (Maryland Compl. ¶¶ 71–83). The complaint cites specific examples of truck drivers inflating the hours reported on their time sheets and describes the methods they used to do so. (Maryland Compl. ¶¶ 84–94, 96–101, 102–04, 110, 118–19, 121–30.)

The Maryland Relator alleges "systematic timesheet fraud occurring on a daily basis" throughout the duration of his time in Iraq. (Maryland Compl. ¶ 52.) The Maryland Relator also alleges, based upon information and belief, that "fraudulent timekeeping and billing practices continue to occur to this day." (Maryland Compl. ¶ 60.) Moreover, "because it is KBR's practice to occasionally transfer truck driving staff between Iraq, Kuwait, and Afghanistan, it is the good faith belief of [the Maryland Relator] that these

particular fraudulent timekeeping and billing practices are commonplace throughout KBR's operations in Iraq, Kuwait, and Afghanistan." (Maryland Compl. ¶ 61.) [REDACTED]

II. Standard of Review

A. Subject Matter Jurisdiction

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Defendants may attack subject matter jurisdiction in one of two ways. First, defendants may contend that the complaint fails to allege facts upon which subject matter jurisdiction may be based. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *King v. Riverside Reg'l Med. Ctr.*, 211 F. Supp. 2d 779, 780 (E.D. Va. 2002). In such instances, all facts alleged in the complaint are presumed to be true. *Adams*, 697 F.2d at 1219; *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995).

Alternatively, defendants may argue that the jurisdictional facts alleged in the complaint are untrue. *Adams*, 697 F.2d at 1219; *King*, 211 F. Supp. 2d at 780. In that situation, "the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Virginia v. United States*, 926 F. Supp. at 540 (quoting *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993)); see also *Velasco v. Gov't of Indonesia*, 370 F.3d 393, 398 (4th Cir. 2004) (holding that "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without con-

verting the proceeding to one for summary judgment") (citations omitted).

In either circumstance, the burden of proving subject matter jurisdiction falls on the plaintiff. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Adams*, 697 F.2d at 1219; *Johnson v. Portfolio Recovery Assocs.*, 682 F. Supp. 2d 560, 566 (E.D. Va. 2009) (holding that "having filed this suit and thereby seeking to invoke the jurisdiction of the Court, Plaintiff bears the burden of proving that this Court has subject matter jurisdiction").

B. Failure to State a Claim

Rule 12(b)(6) allows a court to dismiss those allegations which fail "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A court may dismiss claims based upon dispositive issues of law. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). The alleged facts are presumed true, and the complaint should be dismissed only when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.*

In deciding a 12(b)(6) motion, a court must first be mindful of the liberal pleading standards under Rule 8, which require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. While Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions" because "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (citation omitted).

To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to

'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to meet this standard, *id.*, and a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level. ." *Twombly*, 550 U.S. at 555. Moreover, a court "is not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 129 S.Ct. at 1949–50.

III. Analysis

Defendants argue that this Court should dismiss Carter's Complaint because the Court lacks jurisdiction under two provisions of the FCA: the FCA's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), (Mem. at 5–13), and the FCA's public disclosure bar,[3] 31 U.S.C. § 3730(e)(4)(A), (Mem. at 16–22). Second, Defendants argue that even if neither jurisdictional bar applies, virtually the entire case must be dismissed due to the FCA's six-year statute of limitations. (Mem. at 13–16.)

A. The First-to-File Bar

Defendants first argue that this case remains barred by the California Action, even though the Cal-

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[3] The Court does not address Defendants' public disclosure bar argument because the Court need not reach that issue to dispose of Defendants' Motion to Dismiss.

ifornia Action was dismissed prior to the filing of the instant complaint.[4] Next, Defendants argue that aside from the California Action, this case is barred under the first-to-file rule [REDACTED] filed in Maryland [REDACTED]

Section 3730(b)(5) of the FCA is "known colloquially as the Act's first-to-file bar." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004); *Erickson ex rel. United States v. Am. Inst. of Biological Scis.*, 716 F. Supp. 908, 918 (E.D. Va. 1989) (explaining that "this provision establishes a first in time rule"). The text of the first-to-file bar provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Section 3730(b)(5) is jurisdictional in nature, and if an action based on the facts underlying a pending case comes before the court, a court must dismiss the later-filed case for lack of jurisdiction. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186–87 (9th Cir. 2001).

1. Related Action

The Court is mindful that "[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Ramey v. Dir., Office of Workers'*

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[4] The Court need not resolve this issue, as it concludes that Carter's action is barred by the Maryland Action discussed herein.

Comp. Program, 326 F.3d 474, 476 (4th Cir. 2003) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others," and must presume that when Congress writes a statute, it "says what it means and means what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive Relators from bringing related actions based on the same underlying facts. *See Lujan*, 243 F.3d at 1187. Importantly, Congress drafted the statute to bar all "related actions" not all "identical actions," and thus a subsequent action may differ from a first-to-file action, yet nevertheless be jurisdictionally barred so long as it is considered a "related" action. *See Grynberg*, 390 F.3d at 1279 (holding that "an identical facts test would be contrary to the plain meaning of the statute, which speaks of 'related' *qui tam* actions, not identical ones.") Some courts have held that "if the later-filed complaint alleges the same type of wrongdoing as the first, and the first adequately alleges a broad scheme encompassing the time and location of the later filed, the fact that the later complaint describes a different time period or geographic location does not save it from the absolute first-to-file bar of § 3730(b)(5)." *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 13 (D.D.C. 2003).

In determining if the actions are "related," courts have adopted slight variations of a common approach: § 3730(b)(5) is an "exception-free" provision that bars subsequently filed actions alleging the "same materi-

al elements described in an earlier suit, regardless of whether the allegations incorporate somewhat different details."[5] *Lujan*, 243 F.3d at 1189.

In accordance with this Court's May 10, 2010 Memorandum Opinion in Carter 2008, the Court will apply the test developed in *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989). That is, the Court will find that Carter's suit is barred unless: (1) it is based on facts different from those alleged in the prior suit; and, (2) gives rise to separate and distinct recovery by the government. *See Erickson*, 716 F. Supp. at 918. In determining whether the first-to-file bar applies, the Court looks "at the facts as they existed at the time that action was brought." *Grynberg*, 390 F.3d at 1279.

The Court first examines whether the claims are "based on facts different from those alleged in the prior suit." *Erickson*, 716 F. Supp. at 908. [REDACTED][6] While the Maryland Action focuses on activities at Camp Anaconda (see Maryland Compl.

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[5] Some Courts have required the same "type of fraud," see *Grynberg*, 390 F.3d at 1280); the same "essential facts," see *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs*, 149 F.3d 227, 232–33 (3rd Cir. 1998)); or the same "material elements of fraud," see *Lujan*, 243 F.3d at 1189).

[6] Carter's complaint also names two other entities defendants—KBRSI and SEII—both of which are indirect subsidiaries of KBR. (Compl.¶¶ 7–8.) Complaints that allege the same material elements of fraud may be deemed related even if they are asserted against different entities within the same corporate structure. *See Grynberg*, 390 F.3d at 1280 n.4; *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 218 (D.C. Cir. 2003).

¶¶ 65–70), the Maryland Relator also alleges that fraudulent timekeeping and billing practices are commonplace throughout KBR's operations in Iraq (see Maryland Compl. ¶ 61), thus encompassing Al Asad and Ar Ramadi. The Maryland Action also alleges that time sheet fraud was an "institutionalized" practice known throughout KBR's corporate structure in Iraq and other countries. (Maryland Compl. ¶¶ 163, 165.) [REDACTED]

Following this Court's July 23, 2009 Memorandum Opinion in 2008 Carter, the scope of Carter's claims has been narrowed to the submission of fraudulent time sheets between September 1, 2004 and April 2005 at Ar Ramadi and during January 2005 at Al Asad. (Mem. Op. at 19, 22, 34, 1:08cv1162 [Dkt. 121] (July 23, 2009).) The Maryland Relator worked for KBR in Iraq from March 27, 2005 to January 15, 2006 (Maryland Compl. ¶ 1) [REDACTED] While most of the Maryland Relator's employment in Iraq was after the relevant time period in Carter's case, the Maryland Action also states that KBR provided support to the United States military in Iraq since at least March 2003. (See Maryland Compl. ¶ 19.) Additionally, the Maryland Action alleges that Defendants' time sheet fraud had been "institutionalized" and was rooted in an "unwritten corporate policy." (*See* Maryland Compl. ¶¶ 24–26, 163, 165.) [REDACTED] *see United States ex rel. Chovanec*, 606 F.3d 361, 364–65 (7th Cir. 2010) (finding complaint alleging fraud in Illinois in 2002 related to complaints alleging fraud in California and Kansas in the 1990s).

[REDACTED] "a relator cannot avoid § 3730(b)(5)'s first-to-file by simply adding factual de-

tails or geographic locations to the essential or material elements" of the first-filed claims. *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009). [REDACTED] These allegations certainly provide the Government with knowledge of "the essential facts of a fraudulent scheme" and "enough information to discover related frauds." *See Branch*, 560 F.3d at 378 (quoting *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998)).

[REDACTED] This Court, however, previously rejected such a distinction, finding that 2008 Carter was related to the California Action, notwithstanding the fact that the California Relators were a carpenter and a plumber. (Mem. Op. at 4–5, 15–16, 1:08cv1162 [Dkt. 306] (May 10, 2010).)

[REDACTED][7] "This is the 'same type of wrongdoing,' as seen in Carter's case, albeit across a broader spectrum of LOGCAP III tasks." (*Id.* (quoting *Lujan*, 243 F.3d at 1188).)

Next the Court examines whether Carter's action "gives rise to separate and distinct recovery by the government." *Erickson*, 716 F. Supp. at 908. The Court notes that the first element of its inquiry, which has been answered affirmatively, is the crucial one. *See Ortega*, 240 F. Supp. 2d at 13. "[A]n examination of possible recovery merely aids in the determination of whether the later-filed complaint alleges a different type of wrongdoing on new and different

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[7] Indeed, as noted in the previous footnote, other courts have found complaints "related" even when they involve allegations against different affiliated entities. See *Grynberg*, 390 F.3d at 1280 n.4; *Hampton*, 318 F.3d at 218.

material facts." *Id.* [REDACTED] *See United States v. Apollo Grp., Inc.*, No. 08 CV 1399, 2009 WL 3756623, at *3 (S.D. Cal. Nov. 6, 2009) (finding that the earlier-filed action and later-filed action were based on the same type of wrongdoing, and hence did not allege two different fraudulent schemes that would give rise to separate and distinct recovery).

[REDACTED] *See Ortega*, 240 F. Supp. 2d at 13 ("[T]he fact that the later complaint describes a different time period or geographic location that could theoretically lead to a separate recovery does not save it from the absolute first-to-file bar of § 3730(b)(5).") "[S]uch duplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *Id.* (quoting *LaCorte*, 149 F.3d at 234). Both elements of the *Erickson* test are therefore satisfied. Accordingly, the Court deems Carter's action related to the Maryland [REDACTED] within the meaning of § 3730(b)(5).

2. Pending Action

Section 3730(b)(5)'s plain language establishes a first-to-file bar, preventing successive plaintiffs from bringing suit while a related action is "pending." The Maryland Action was filed on June 5, 2007 (Mem. at 11), almost four years before Carter filed the instant complaint on June 2, 2011. The Maryland Action was voluntarily dismissed without prejudice on October 31, 2011, after the Maryland Relator failed to serve his complaint on the defendants. (Opp. at 13 n.15; Reply at 8 n.8.) However, whether a *qui tam* action is barred by § 3730(b)(5) is determined by looking at the facts as they existed when the action was

brought. *Grynberg*, 390 F.3d at 1279. It is undisputed that the Maryland Action was pending when Carter filed the instant suit. Thus the Maryland Action is deemed pending for purposes of § 3730(b)(5), and Carter's action is barred.

[REDACTED] Having determined that Carter's suit is barred by the Maryland Action, the Court need not reach the issue.

B. Statute of Limitations

Defendants also argue that Carter's claims are barred by the statute of limitations.[8] (Mem. at 13.) Because Carter has elected to re-file new actions rather than amend his prior complaints, Defendants contend that his claims are not subject to tolling. (*Id.*) The FCA provides that a civil action under § 3730 may not be brought "more than 6 years after the date on which the violation of § 3729 is committed." 31 U.S.C. § 3731(b)(1).[9] Defendants argue that a viola-

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[8] The Court's conclusion that Carter's suit is precluded by the first-to-file bar is, of course, dispositive. The Court addresses Defendants' statute-of-limitations argument because, in addition to providing an independent basis for dismissal of Carter's claims, it bears on whether or not dismissal should be with prejudice.

[9] Section 3731(b)(2) provides for an alternative three-year limitations period "after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). The Fourth Circuit, however, has held that § 3731(b)(2) extends the statute of limitations beyond six years only in cases in which the United States is a party. *United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). Since the United States has elected not to intervene in this case, Carter is bound by the six-year limitations period set forth in § 3731(b)(1).

tion is committed for purposes of § 3731 when the claim for payment is submitted to the Government.[10] (Mem. at 14.) Applying the six-year limitations period from the date the false claims were submitted, Defendants contend that Carter's claims are time-barred except as to $673.56 relevant to Count 4, which was included on a public voucher submitted to the Government on June 15, 2005. (Mem. at 15 & n.9.) Carter's sole argument[11] in response is that the statute of limitations on all of his claims is tolled by

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[10] The Fourth Circuit has not clarified when a violation is deemed to have occurred under § 3731(b)(1). A majority of courts have concluded that the statute of limitations starts to run when a false' claim is submitted to the Government. *See United States ex rel. Dugan v. ADT Sec. Servs., Inc.*, No. DKC 2003–3485, 2009 WL 3232080, at *4 n.2 (D. Md. Sept. 29, 2009) (citing cases). At least one district court in the Fourth Circuit has held that the statute of limitations is six years from the date of filing a false claim. *See United States v. Shelburne*, No. 09cv00072, 2010 WL 2542054, at *4 (W.D. Va. June 24, 2004).

[11] In a footnote of his proposed sur-reply, and at oral argument, Carter also argued that his claims should be equitably tolled. For the reasons in Section III.C, infra, Carter's Motion for Leave to File a Sur-reply is denied. In any event, the Court notes that equitable tolling is "reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). Here, Carter timely filed an identical action—Carter 2010—which was dismissed because he chose to proceed while Carter 2008 was still on appeal, thereby triggering the first-to-file bar. Thus, Carter cannot show that the instant suit is untimely due to circumstances external to his own conduct, and equitable tolling is inappropriate.

virtue of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287.[12] (Opp. at 19.)

1. Statutory Background

The WSLA was enacted in 1942, and extended the time prosecutors had to bring charges relating, to criminal fraud offenses against the United States. Wartime Enforcement of Fraud Act of 2008, S. Rep. No. 110–431, at 2 (2008). Prior to October 14, 2008, the WSLA provided that:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

18 U.S.C. § 3287 (2008). On October 14, 2008, the Act was amended to expand its operation to times "[w]hen the United States is at war or *Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).*" 18 U.S.C. § 3287 (2011) (emphasis added). The amendment also extended the suspension period until "5 years after the termination of hostilities as proclaimed by a Pres-

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[12] WSLA was reenacted as the Wartime Enforcement of Fraud Act of 2008 ("WEFA"). *See* Wartime Enforcement of Fraud Act of 2008, S.Rep. No. 110–431 (2008). For ease of reference, the Court refers to the statute as the WSLA, as that is the name used in the parties' briefs and in the case law discussed herein.

idential proclamation, with notice to Congress, or by a concurrent resolution of Congress." *Id.*

Courts are in conflict as to whether the post-amendment WSLA should apply to offenses which occurred before passage of the 2008 amendments.[13] Courts are also divided as to whether the pre-amendment WSLA requires a formal declaration of war or whether the authorized use of military force may also suffice.[14] Because the Court concludes that neither the pre-amendment nor the post-amendment version of the WSLA applies to Carter's action—*i.e.*, a non-intervened civil FCA action—the Court need not decide these issues.

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[13] *Compare United States v. Anghaie*, No. 1:09–CR–37, 2011 WL 720044, at *2 (N.D. Fla. Feb. 21, 2011) (applying post-amendment WSLA to counts for which the limitations period would have expired after the amendment) with *United States v. W. Titanium, Inc.*, No. 08–CR–4229, 2010 WL 2650224, at *1, 3–4 (S.D. Cal. July 1, 2010) (applying pre-amendment WSLA to offenses that occurred prior to the amendment) and *United States v. Pearson*, No. 2:09cr43, 2010 WL 3120038, at *1 (S.D. Miss. Aug. 4, 2010) (same).

[14] *Compare Anghaie*, 2011 WL 720044, at *2 (pre-amendment WSLA requires congressional declaration of war), *Western Titanium*, 2010 WL 2650224, at *3–4 (same) and *United States v. Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993)(Persian Gulf conflict not a "war" within meaning of the WSLA) *with United States v. Prosperi*, 573 F. Supp. 2d 436, 455–56 (D. Mass. 2008) (concluding that the United States was "at war" for purposes of the pre-amendment WSLA during the Afghanistan and Iraq conflicts that began in 2001 and 2002) *and Pearson*, 2010 WL 3120038, at *l–2 (same).

2. Applicability of the WSLA to Non-Intervened Civil FCA Actions

The issue before the Court is a narrow one: whether the WSLA applies to civil FCA actions brought by a relator in which the Government has declined to intervene. Resolution of this issue requires the Court to interpret the WSLA—specifically the meaning of the term "offense." In keeping with the principles of statutory construction discussed *supra*, the Court begins by looking at the plain language of the statute. At oral argument, Carter argued that the statutory language clearly applies to civil offenses against the United States, whether the United States is or is not a party. The Court disagrees. The Court need only look at the definition of the word "offense" to see that Carter is mistaken. Black's Law Dictionary defines "offense" as "[a] violation of the law; a crime, often a minor one." Black's Law Dictionary 1110 (8th ed. 2004). The American Heritage Dictionary similarly defines "offense" as, among other things, "[a] transgression of law; a crime" and lists "crime" as a synonym. American Heritage Dictionary of the English Language 1255 (3d ed. 1992); *see also* Black's Law Dictionary 1110 ("The terms 'crime,' 'offense,' and 'criminal offense,' are all said to be synonymous, and ordinarily used interchangeably.") (citing 22 C.J.S. *Criminal Law* § 3, at 4 (1989)). Black's includes an entry for the term, "civil offense," but rather than provide a definition, it cross-references "public tort." *Id.* at 1111. Thus, it is by no means clear from the statutory language that the term "offense" as used in the WSLA necessarily includes civil offenses, let alone non-intervened civil FCA actions.

Defendants argue that the applicability of the WSLA to the FCA is doubtful, citing *Marzani v. United States*, 168 F.2d 133, 135 (D.C. Cir. 1948), *aff'd by an equally divided Court*, 335 U.S. 895 (1948). In *Marzani*, a criminal case involving the false statements clause from the criminal provisions of the FCA,[15] the D.C. Circuit held that the WSLA "does not apply to offenses under the False Claims Act"—a conclusion which it believed necessarily followed from Supreme Court precedent. *Marzani* first cited *United States v. Noveck*, 271 U.S. 201 (1926), a case in which the Supreme Court addressed whether the predecessor statute to the WSLA applied to the crime of perjury in an income tax return. The Supreme Court held that it did not, because defrauding the United States is not an element of the crime of perjury. *Noveck*, 271 U .S. at 203–04. Next, *Marzani* cited *United States v. Gilliland*, 312 U.S. 86 (1941), a criminal case which asked whether the FCA is restricted to matters in which the Government has some financial or proprietary interest. The Supreme Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of FCA offenses. *Gilliland*, 312 U.S. at 93. Based on this line

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[15] The FCA was enacted in 1863 and provided both civil and criminal sanctions for "false, fictitious, or fraudulent" claims submitted to the United States. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. In 1874, the FCA's civil and criminal provisions were severed, the civil penalties being codified in one section of the United States Code and the criminal provisions in another. *See* U.S. Rev. Stat. tit. 36, § 3490 (1875) (civil); *id.* tit. 70, § 5438 (criminal). In 1982, Congress enacted legislation making the FCA's civil provisions freestanding, without a cross-reference to a criminal statute. *See* Pub. L. No. 97–258, § 3729, 96 Stat. 877, 978 (1982).

of cases, the D.C. Circuit concluded that since pecuniary fraud is not "an essential ingredient" of offenses under the FCA, the WSLA does not apply. *Marzani*, 168 F .2d at 136. *See also Bridges v. United States*, 346 U.S. 209, 222 (1953) (applying similar reasoning to criminal charges involving false statements under oath).

However, in *United States v. Grainger*, 346 U.S. 235, 243 n.14 (1953), also a criminal case, the Supreme Court admonished that references made in cases arising under the false statements clause, such as *Marzani*, should be read as referring to that clause rather than to the false claims clause or the FCA as a whole. Unlike *Marzani*, *Grainger* dealt with the false claims clause, and involved offenses including the making of claims upon the Government for payments induced by knowingly false representations. *Id.* at 242. The Supreme Court noted that this offense included more than the mere making of a false statement, *id.*, and held that the WSLA therefore applied, *id.* at 243.

Here, Carter alleges both false claims (Count 1) and false statements (Count 4). The false statements at issue, however, arise in the civil context and are therefore distinguishable from those in *Marzani*.[16]

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[16] Indeed, the false statements clause from the criminal provisions of the FCA, considered in *Marzani*, read as follows: "whoever shall knowingly and willfully . . make . . . any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both." 168 F.2d at 135 (citing 18 U.S.C. § 80, now 18 U.S.C. § 1001). Conspicuously absent is a pecuniary element. The false statements clause from the civil

Defendants' alleged fraud is decidedly pecuniary in nature—the falsification of time cards for purposes of fraudulently billing the Government. *Marzani*, by contrast, involved allegations that the defendants had made false statements to government agencies in seeking federal employment and lacked a pecuniary element. For these reasons, *Marzani* does not compel the conclusion that the WSLA is inapplicable to Carter's false statement claim. *See United States v. Prosperi*, 573 F. Supp. 2d 436, 441 (D. Mass. 2008) (distinguishing *Marzani* and *Bridges* and holding that the WSLA applied to criminal charges that defendants created false reports in order to procure payment from the Government).

As Carter points out, a handful of out-of-circuit federal trial courts have concluded that the WSLA applies to civil actions brought under the FCA.[17] In all but one of these cases, however, the United States was the party—not a relator. In the lone case brought by a relator and in which the United States declined to intervene, *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 550–51 (D.D.C. 1956), the court found that after the 1944 amendment to the

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provisions of the FCA, relevant here, applies to "any person who knowingly makes, uses, or causes to be made or used, a false record or statement *material to a false or fraudulent claim* [for payment.]" 31 U.S.C. § 3729(b) (emphasis added).

[17] *See, e.g.*, *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 550–51 (D.D.C. 1956); *United States v. Temple*, 147 F. Supp. 118, 120–21 (N.D. Ill. 1956); *United States v. Salvatore*, 140 F. Supp. 470, 473 (E.D. Pa. 1956); *Dugan & McNamara, Inc. v. United States*, 127 F. Supp. 801, 803–04 (Ct. Cl. 1955); *United States v. Strange Bros. Hide Co.*, 123 F. Supp. 177, 184 (N.D. Iowa 1954).

WSLA, in which Congress removed the term "now indictable," the statute became applicable to civil actions, including those brought under the FCA. The court did not distinguish actions brought by relators from actions in which the United States is a party. As it turns out, the court need not have decided the issue at all because the relator exceeded even the WSLA's extended limitations period. *Id.* at 551.

The Fourth Circuit, on the other hand, has distinguished FCA actions in the statute-of-limitations context based on whether or not the United States is a party to the action. *See United States ex rel. Sanders v. N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293 (4th Cir. 2008). Indeed, it is the reasoning in *Sanders* that leads this Court to the conclusion that the WSLA does not apply to non-intervened civil FCA actions. *Sanders* held that 31 U.S.C. § 3731(b)(2) extends the FCA's statute of limitations only in cases in which the United States is a party. 546 F.3d at 293. First, *Sanders* stated that any other reading of the statute would be problematic given that Section 3731(b)(2) refers only to the United States—and not to relators. *Id.* The WSLA likewise speaks in terms of the United States, and does not mention relators.[18] *See* 18 U.S.C. § 3287 (2011) (referring to offenses involving "fraud or attempted fraud against the *United States or any agency thereof*") (emphasis added).

Second, *Sanders* rejected the relator's argument that the phrase "[a] civil action under section 3730" in

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[18] The legislative history surrounding the 2008 amendment also omits reference to relators. *See* S. Rep. No. 110–431. Rather, the legislative history speaks of prosecutors, investigators, and auditors. *See id.* at 2.

the preface to Section 3731(b) includes all civil actions under the FCA." 546 F.3d at 294. The Fourth Circuit disagreed with the premise that " 'a civil action' must be read indiscriminately to encompass all FCA claims in all contexts." *Id.* This Court similarly finds that while the term "offense" in the WSLA *may* include civil actions, it by no means must encompass *all* civil actions.

Third, many of the "practical difficulties" discussed in *Sanders* would arise were the WSLA deemed applicable to non-intervened civil FCA actions. The Fourth Circuit recognized that:

> [Relator's] reading of Section 3731(b)(2) would allow relators to sit on their claims for up to ten years before filing an action and informing the government of the material facts. Indeed, relators would have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery.

Id. at 295. In comparison, application of either version of the WSLA to non-intervened civil FCA actions could allow relators to sit on their claims well in excess of ten years. For example, were this Court to take August 31, 2010[19] as the end of the war in Iraq, application of the pre-amendment WSLA to Carter's

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[19] On August 31, 2010, President Obama declared "the end of our combat mission in Iraq" in a nationally televised presidential speech. *See* President Barack Obama, Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq (Aug. 31, 2010), *available at* http://www.whitehouse.gov/th e-press-office/2010/08/31/remarks-presidentaddress-nation-end-combat-operations-iraq.

claims would extend the limitations period to August 31, 2019—almost fourteen years after the final fraudulent claims Defendants allegedly submitted to the Government. The 2008 amendments to the WSLA, which extended the suspension period to five years, would of course only serve to exacerbate the problem.

As the Fourth Circuit admonished, "allowing relators to sit on their claims "would undermine the purpose of the *qui tam* provisions of the FCA: to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not—'to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *Id.* (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1943)). Application of the WSLA as proposed by Carter would instead allow fraud to extend perhaps indefinitely.[20] Moreover, "a relator's failure to notify the government promptly of FCA violations might also cause the government to lose out on its ability to bring a criminal fraud prosecution, which must be filed within five years of the violation." *Id.* (citing 18 U.S.C. §§ 287, 3282). For these reasons, the Court concludes that the WSLA does not apply to the instant suit—that is, a civil FCA action brought by a relator, in which the United States has opted not to intervene.

For the foregoing reasons, the Court concludes that Carter's claims are time-barred except for the

---

[20] Indeed, in his proposed sur-reply and during oral argument, Carter asserted that "war" has yet to conclude within the meaning of the WSLA. Thus, according to Carter, the statute of limitations on his claims still hangs in a state of suspension.

public voucher for $673.56 relevant to Count 4. Of course, this claim and Carter's complaint as a whole are independently barred by operation of the first-to-file bar. Because the aforementioned public voucher was submitted to the Government on June 2, 2005, it too would be untimely were Carter to again file a new action. And amendment of the complaint would provide no cure to the Court's lack of jurisdiction by virtue of the first-to-file bar. *See United States ex rel. Branch Consultants LLC v. Allstate Ins. Co.*, 782 F Supp. 2d 248, 267–68 (E.D. La. 2011); *Ortega*, 240 F. Supp. 2d at 14. Accordingly, dismissal is with prejudice.

C. Motion for Leave to File Sur-reply

Carter moves to file a sur-reply to respond to "five new arguments" raised in Defendants' reply brief. (Mot. for Leave to File Sur-reply [Dkt. 32] at 1.) These arguments respond to Carter's contention, raised in his opposition brief, that his claims are not barred by the statute of limitations because the limitations period has been suspended by operation of the WSLA.

A court has the discretion to allow a sur-reply where a party brings forth new material or deploys new arguments in a reply brief. *See, e.g., Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). Where a party "seeks merely to re-open briefing on the issues raised in [a] motion to dismiss and challenge [the movant's] explanations of cited case law," a sur-reply should not be allowed. *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 467 (D. Md. 2008).

Carter, then, may not submit a sur-reply simply because Defendants used their reply brief to further support an argument made in their opening brief or to respond to new arguments in Carter's opposition. And that is precisely what happened here. Defendants raised the statute of limitations as an issue in their opening brief. Carter then argued, in one brief paragraph, that his claims were not time-barred because of the WSLA. And Defendants responded to that argument in their reply brief. Hence, none of the "new arguments" cited by Carter are truly new. That Carter chose to devote little time to his discussion of the WSLA in his opposition brief does not entitle him to file a sur-reply. Accordingly, the Court will deny Carter's motion.

IV. Conclusion

For these reasons, the Court will grant Defendants' Motion to Dismiss and deny Relator's Motion to File a Sur-reply. This action is dismissed with prejudice.

An appropriate Order will issue.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Filed April 23, 2013

No. 12-1011
(1:11-cv-00602-JCC-JFA)

UNITED STATES EX REL. BENJAMIN CARTER,
PLAINTIFF–APPELLANT,

v.

HALLIBURTON CO.; KELLOGG BROWN & ROOT SERVICES, INC.; SERVICE EMPLOYEES INTERNATIONAL, INC.; KBR, INC., DEFENDANTS–APPELLEES.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

FOR THE COURT:
/s/ Patricia S. Connor, Clerk

APPENDIX D

1. 18 U.S.C. § 3287 (2006) provides:

Wartime suspension of limitations

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress. Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section.

2. 18 U.S.C. § 3287 (2009 Supp.) provides:

Wartime suspension of limitations

When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1)

involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

3. 31 U.S.C. § 3730 provides, in pertinent part:

Civil actions for false claims

* * * * *

(b) Actions by private persons

* * * * *

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

* * * * *

4. 31 U.S.C. § 3731 provides, in pertinent part:

False claims procedure

* * * * *

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

* * * * *

6. 31 U.S.C. § 3732 provides, in pertinent part:

False claims jurisdiction

(a) Actions under section 3730

Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

* * * * *

OPPOSITION BRIEF

RECORD AND BRIEFS

No. 12-1497

Supreme Court, U.S.
FILED
AUG 26 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR, INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT BENJAMIN CARTER IN OPPOSITION

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QUESTIONS PRESENTED

1. In a situation where there is no split in the circuits, should this Court grant interlocutory review of a carefully considered, detailed decision of the Fourth Circuit Court of Appeals that correctly applied the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287, to claims of fraud against the United States Government pertaining to the failure to purify water for troops stationed in Iraq during an on-going war?

2. In a situation where there is no split on this narrow issue in the circuits, should this Court grant interlocutory review of a decision of the Fourth Circuit Court of Appeals that applied existing circuit precedents to the specific facts of this case and determined that a jurisdictional dismissal under the False Claims Act's first-to-file bar, 31 U.S.C. § 3730(b)(5), should be without prejudice, thereby preventing a defendant from claiming immunity from suit in perpetuity based on a potentially frivolous or jurisdictionally incompetent complaint?

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INTRODUCTION

Respondent Benjamin Carter respectfully submits that none of Petitioners' arguments merit further review. The decision below correctly followed well-established doctrines of this Court. Petitioners concede that no circuit split exists concerning neither the majority panel's application of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287,[1] nor the full panel's application of the first-to-file provision of the United States False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733.[2] Additionally, this case presents the unique facts for applying the WSLA to an FCA matter, because the fraud occurred during Operation Iraqi Freedom, the fraud was perpetrated in Iraq, and the fraud directly impacted the troops serving in Iraq. The decision below also correctly followed circuit court precedent in holding that a dismissal under the first-to-file jurisdictional bar has no preclusive effect and should have been a "without prejudice" dismissal, which is consistent with well-settled law that a dismissal for lack of jurisdiction is not an adjudication on the merits or a bar to further claims. Moreover, the petition for certiorari is not yet ripe for this Court's review because the Fourth Circuit remanded the matter to the district court for

---

[1] The WSLA extends the time for bringing an action relating to a fraud against the United States during a time of war.

[2] "The FCA prescribes penalties for claims submitted to the government that are known to be false" and encourages "citizens to act as whistleblowers. . . ." Pet. App. at 17a.

further proceedings, and a fully briefed motion to dismiss is currently pending.

STATEMENT OF CASE

Petitioners Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International, Inc. (collectively "Petitioners") perpetrated a massive fraud against the United States Government during a time of war by billing for services that should have been provided to United States troops in a war zone, but that were never performed, and by charging for hours that were never worked. Pet. App. at 2a-3a. As alleged in the complaint, Petitioners hired Respondent Benjamin Carter ("Respondent" or "Carter") and others to test and purify water for United States troops engaged in Operation Iraqi Freedom in Iraq. Pet. App. at 3a. However, Petitioners did not test or purify water, and fraudulently instructed their employees to submit erroneous time cards totaling at least twelve hours per day regardless of the amount of time each employee actually worked. Pet. App. at 3a-4a. Petitioners repeatedly lied to the United States Government about performing water testing and purification, and as a result the United States paid for this work under Petitioners' "LOGCAP III" government contract with the United States. Pet. App. at 3a.

Carter initiated this matter upon the filing of a *qui tam* lawsuit under the FCA on February 1, 2006. Pet. App. at 4a. The Government conducted an

investigation after which the complaint was unsealed in May 2008. Pet. App. at 4a. The parties engaged in extensive motion practice and discovery, which closed in March 2010. Pet. App. at 4a. However, one month before the scheduled trial date, the United States Department of Justice disclosed the existence of another FCA matter filed under seal in December 2005, *United States ex rel. Thorpe v. Halliburton Co.*, No. 05-cv-8924 (C.D. Cal. filed Dec. 23, 2005) ("*Thorpe*"). Pet. App. at 4a-5a. On May 10, 2010, the district court granted Petitioners' motion to dismiss Carter's complaint without prejudice, finding that *Carter* and *Thorpe* were "related" actions within the meaning of the FCA, and therefore Carter's action was barred under the first-to-file provision of the FCA, 31 U.S.C. § 3730(b)(5). Pet. App. at 5a. Carter re-filed his complaint following the dismissal of *Thorpe*, which occurred on July 30, 2010. Pet. App. at 5a.

As detailed in the panel's opinion, following numerous procedural issues resulting in Carter re-filing his complaint on June 2, 2011, Petitioners moved to dismiss that complaint. Pet. App. at 5a-7a. On November 29, 2011, the district court granted Petitioners' motion to dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, finding that another action, *United States ex rel. Duprey v. Halliburton, Inc.*, No. 8:07-cv-1487 (D. Md. filed June 5, 2007), was "related" and "pending" under the FCA's first-to-file bar at the time Carter filed his 2011 complaint. Pet. App. at 63a-64a. The district

court also found that Carter's complaint was time-barred because it had been filed beyond the FCA's six-year statute of limitations, and that the WSLA did not toll the statute of limitations for an action filed by a private relator.[3] Pet. App. at 74a-75a. Unlike the district court's dismissals of Carter's other complaints under the first-to-file bar, in this instance, the district court dismissed this complaint with prejudice. Pet. App. at 75a, 76a. Additionally, the district court did not consider whether the public disclosure provision of the FCA barred Carter's action. Pet. App. at 7a.

Carter filed a notice of appeal of the district court's dismissal of his complaint on December 28, 2011, and in a thorough and well-reasoned opinion, the majority panel of the Fourth Circuit reversed the district court on March 18, 2013. Pet. App. at 2a. The Fourth Circuit found that the WSLA applied to Carter's claims of fraud tolling the FCA's statute of limitations because the United States was "at war" during the pertinent time period. Pet. App. at 8a-16a. Additionally, the Fourth Circuit panel held that the district court erred in dismissing Carter's complaint with prejudice. Pet. App. at 20a-23a. The panel determined that related actions were pending when Carter filed his complaint on June 2, 2011, and found

---

[3] Carter filed his original complaint within the FCA's six-year statute of limitations period. However, due to the lengthy procedural history and the district court's numerous rulings on Petitioners' motions to dismiss Carter's complaints, the WSLA arose as an issue in this case.

that § 3730(b)(5) – which prevents a plaintiff from bringing "a related action based on the facts underlying the *pending* action" – barred his action. Pet. App. at 20a-21a (emphasis added). Nevertheless, the panel noted that this finding did not end its inquiry, and held that § 3730(b)(5) does not preclude subsequent actions once a related case was no longer pending. Pet. App. at 21a-22a. Thus, the panel held that the district court erroneously dismissed Carter's complaint with prejudice. Pet. App. at 22a. The panel expressly declined to address whether Carter's complaint should be dismissed on the basis of the FCA's public disclosure provision because that was not decided by the district court.[4] Pet. App. at 22a-23a.

Petitioners moved for a rehearing en banc before the Fourth Circuit, which the Fourth Circuit denied on April 23, 2013. Pet. App. at 77a. As noted in that order, no Fourth Circuit Judge requested a poll under Fed. R. App. P. 35. Pet. App. at 77a.

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[4] Presently pending before the district court is Petitioners' motion to dismiss based upon the FCA's public disclosure provision, 31 U.S.C. § 3730(e)(4). The motion is scheduled to be heard by the district court on September 6, 2013.

REASONS FOR DENYING THE PETITION

I. The Court Should Deny The Petition As Interlocutory

Absent extraordinary circumstances, this Court generally awaits a final judgment before granting a petition for certiorari. *Va. Military Inst. v. United States*, 508 U.S. 946, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Postponing the Court's intervention until a final judgment in the lower courts best serves judicial efficiency. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until the final decree.").

Here, the Fourth Circuit panel remanded the case to the district court for further proceedings, and a fully briefed motion to dismiss is currently pending in the district court. Pet. App. at 23a. This petition will be moot if the district court grants Petitioners' motion, and if the court denies that motion there will be a trial and additional briefing that will illuminate the facts for this Court's potential review. Thus, this matter is not ripe for the Court's review. *See Bd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *see also Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring) ("Because no

final judgment has been rendered . I agree with the Court's decision to deny the petitions for certiorari.").

II. WSLA

A. The Panel's Decision Is Sound and Well-Reasoned as the WSLA Applies to Civil Cases

The majority correctly decided that the WSLA applies to civil cases involving fraud on the United States.[5] The FCA is one of the government's primary means of rooting out fraud in the military. *See* U.S. Dep't of Justice Press Release, *Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012* (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html ("The False Claims Act is the government's primary civil remedy to redress false claims for federal money or property, such as loans and payments under contracts for goods and services, including military contracts."). The FCA designates *qui tam* relators, through their counsel, as "private attorneys general," *United States ex rel. Jamison v. McKesson Corp.*, 649

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[5] In 1944, Congress specifically broadened the language of the WSLA to include civil offenses by deleting the words "now indictable" from the statute. The plain language of the statute after 1944 applies "to *any offense* involving fraud or attempted fraud against the United States." 18 U.S.C. § 3287 (emphasis added). *See, e.g.*, *United States v. Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1944); *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546, 551 (D.D.C. 1956) (finding that the WSLA would apply to an FCA action).

F.3d 322, 330 (4th Cir. 2011) (quotations omitted), to pursue civil fraud claims on behalf of the United States in order to "stop massive frauds perpetrated by large [private] contractors during the Civil War." *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 781 (2000). The Fourth Circuit properly held that the WSLA applies to FCA actions. *See, e.g., McCans*, 146 F. Supp. at 551 ("in 1944 Congress in the Contract Settlement Act, 18 U.S.C. § 3287, 58 Stat. 649, 667, enacted July 1, 1944, amended the language of the [WSLA] by deleting the term 'now indictable.' This brought the False Claims Act within its purview."), *aff'd*, 254 F.2d 90 (D.C. Cir. 1958). *See also* Pet. App. at 15a ("whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case."). Moreover, being that the clear intent of Congress in passing the WSLA was to override specific limitations periods for fraud against the United States during a period of war, to hold otherwise would render the WSLA superfluous.

The Fourth Circuit concluded:

> [h]ad Congress intended for "offense" to apply only to criminal offenses, it could have done so by not deleting the words "now indictable" or it could have replaced that phrase with similar wording. However, Congress did not include any limiting language and . in failing to do so it chose for the Act to apply to all

> offenses involving fraud against the United States.

Pet. App. at 14a; *see also id.* at 29a (Wynn, J., concurring) ("we are left to conclude that when Congress said 'any offense,' it meant *any* offense, including offenses raised by private False Claims Act relators."). The majority panel found support for this conclusion from numerous courts that considered the issue. Pet. App. at 13a-14a (citing *United States v. Witherspoon*, 211 F.2d 858 (6th Cir. 1954); *United States v. BNP Paribas*, 884 F. Supp. 2d 589 (S.D. Tex. 2012); *McCans*, 146 F. Supp. 546; *Dugan & McNamara, Inc. v. United States*, 127 F. Supp. 801, 802 (Ct. Cl. 1955)). *See also United States v. Temple*, 147 F. Supp. 118, 120 (N.D. Ill. 1956); *United States v. Salvatore*, 140 F. Supp. 470 (E.D. Pa. 1956); *United States v. Covollo*, 136 F. Supp. 107 (E.D. Pa. 1955); *United States v. Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955) ("If it had been the intent of Congress to make said Act applicable to criminal actions only, instead of using the word 'offense' it could have used such words as 'crime', 'criminal offense', etc."); *United States v. Murphy-Cook & Co., Inc.*, 123 F. Supp. 806 (E.D. Pa. 1954); *United States v. Strange Bros. Hide Co.*, 123 F. Supp. 177 (N.D. Iowa 1954).

Petitioners strain to find support elsewhere because no court has adopted Petitioners' interpretation. The petition relies on the inapposite decisions in *Bridges v. United States*, 346 U.S. 209 (1953) and *United States v. Smith*, 342 U.S. 225 (1952). *Bridges*

is distinguishable from the instant case because the underlying offense in *Bridges* lacked what the Court considered "an essential ingredient" – a fraud of a pecuniary nature. *Bridges*, 346 U.S. at 221. The Court held that the WSLA could not apply because "none of [the charges] involve[d] the defrauding of the United States in any *pecuniary manner* or in a manner concerning property." *Id.* (emphasis added).

Smith did not, contrary to Petitioners' suggestion, analyze whether the WSLA applies to civil offenses. The *Smith* Court dealt with an entirely different concern: "[t]he question [of] whether the Act [applied] to offenses committed after [the] termination of hostilities." *Smith*, 342 U.S. at 227. Moreover, the mere fact that the Court identified the offenses in *Smith* as "crimes," gives no support for this petition. *See also United States v. Grainger*, 346 U.S. 235, 244 (1953) ("Congress sought by its phrase 'involving fraud in any manner' to make the [WSLA] applicable to offenses which are fairly identifiable as those in which fraud is an essential ingredient, by whatever words they be defined"); *BNP Paribas SA*, 884 F. Supp. 2d at 605 ("Because defendants have failed to cite any persuasive authority in support of their contention that the WSLA applies only to criminal and not to civil actions, and because the court finds persuasive the analysis of the WSLA's legislative history, the analysis of the meaning of the word 'offense,' and the conclusion that the amendments to the WSLA made in 1944 extended the WSLA's application to civil actions made in *Dugan & McNamara*,

127 F. Supp. at 801, and in *Kolsky*, 137 F. Supp. at 359, the court concludes that defendants have failed to carry their burden of showing that the FCA claims asserted in this action should be dismissed as time barred. .").

Since the instant action concerns pecuniary fraud for Petitioners' repeated failure to purify water for United States troops stationed at two camps in Iraq, the majority panel properly applied the plain meaning of the WSLA to this FCA action alleging fraud on the United States during a time of war.

B. The WSLA Does Not Require a Formal Declaration of War and There Is No Circuit Split on This Issue

Applying a purely textual reading, the majority panel of the Fourth Circuit determined that the WSLA "does not require a formal declaration of war." Pet. App. at 11a. This straightforward conclusion is correct. Both the pre- and post-2008 versions of the WSLA begin with the phrase, "When the United States is at war. " 18 U.S.C. § 3287. Neither version contains the word "declared," or any reference or phrase that would otherwise limit the WSLA to certain types of conflicts. "Where [a] statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Statutory construction begins with the "language of the statute, and when a statute speaks with clarity to an issue

judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

Congress has, in fact, specifically required a formal declaration of war when its intent was to limit a statute's application. *See* 28 U.S.C. § 2416(d) ("in a state of war declared pursuant to article I, section 8, of the Constitution of the United States"); 50 U.S.C. § 1829 ("a declaration of war by the Congress"); 50 U.S.C. § 1811 ("a declaration of war by the Congress"); 50 U.S.C. § 98f(a)(2) ("in time of war declared by Congress"); 10 U.S.C. § 123(a) ("In time of war, or of national emergency declared by Congress. "); 41 U.S.C. § 1710 ("during war or during a period of national emergency declared by the President or Congress"). Accordingly, Petitioners' suggestion that "When the United States is at war" should in essence be replaced with "When Congress declares war," overlooks a canon of statutory construction that if Congress so desired, it would have limited the WSLA to wars it formally declared as it has done with numerous other statutes. There is no division among the circuit courts on this issue, and, therefore, the Court should deny this petition.

Indeed, Petitioners' failure to cite any circuit split concedes that there is none. *See* Sup. Ct. R. 10. Rather than weigh in on the issue at this time, the Court should allow the issue to percolate in the lower courts – assuming this issue even recurs – before granting certiorari since no circuit court has

addressed the pertinent issues in any of the district court cases cited by Petitioners. *See Brown v. Texas*, 522 U.S. 940, 943 (1997) (noting that "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'" (quoting *McCray v. New York*, 461 U.S. 961, 962-63 (1983))).

Petitioners posit that there is a conflict between the Fourth Circuit's decision and a handful of district court decisions. However, this Court does "not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court. ." Eugene Gressman et al., *Supreme Court Practice* 256 (9th ed. 2007). Moreover, the Fourth Circuit's decision is factually and procedurally distinct from the lower district court opinions relied on by Petitioners. The district court's discussion of the WSLA in *Shelton*, for instance, was *dicta* because it found that the conduct at issue was on-going and within the statute of limitations of the government's conspiracy charge. *United States v. Shelton*, 816 F. Supp. 1132, 1136 (W.D. Tex. 1993). The unpublished decisions relied upon by Petitioners, *United States v. Anghaie*[6] and *United States v. Western*

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[6] At the time of the petition's filing, *United States v. Anghaie* was on appeal before the Eleventh Circuit. On June 7, 2013, the circuit court vacated and remanded the judgment for further findings on evidentiary issues. *See United States v.*

(Continued on following page)

Titanium, Inc.,[7] do not reach a level of conflict among the circuits that justifies certiorari, and thus the decision below does not create an intolerable conflict among the lower courts.

C. The Panel's Decision Does Not Lead to Indefinite Tolling and the Opinion Is Limited to the Particular Facts of This Case

The Fourth Circuit's decision does not indefinitely extend the limitations period.[8] As the majority

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Anghaie, No. 12-10086, 2013 U.S. App. LEXIS 11582 (11th Cir. June 7, 2013). The district court issued an Order on Limited Remand on July 22, 2013. *Anghaie*, No. 09-cv-37 (N.D. Fla. July 22, 2013) (Doc. No. 268). The *Anghaie* docket does not yet indicate any further appeals.

[7] Since the decision in *United States v. Western Titanium, Inc.*, No. 08-cr-4229, 2010 WL 2650224 (S.D. Cal. July 1, 2010), the government dismissed all of its charges with prejudice against two of the defendants, Daniel Schroder and John Cotner, that moved for dismissal in the district court. *Western Titanium*, No. 08-cr-4229 (S.D. Cal. Jan. 13, 2013) (Doc. No. 937).

[8] Petitioners misstate the Fourth Circuit panel's holding in claiming that the panel held that hostilities have not yet ended. Pet. Br. at 8. The panel did not address the issue of whether hostilities ended; rather, the panel only addressed whether Operation Iraqi Freedom was on-going at the time the claims at issue were presented. Pet. App. at 13a ("Neither Congress nor the President had met the formal requirements of the Act for terminating the period of suspension *when the claims at issue were presented for payment*. We therefore conclude that *the United States was at war during the relevant time period* for purposes of the WSLA.") (emphasis added). *Cf.* Proclamation No. 8785, 77 Fed. Reg. 16,905 (Mar. 22, 2012),

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panel held, and Judge Wynn aptly explained, the WSLA simply "tolls the limitations period for fraud actions for a bounded period of time: the time during which the country is at war or otherwise engaged in a military conflict." Pet. App. at 29a (Wynn, J., concurring); *accord* Pet. App. at 16a. Courts routinely interpret and apply statutes or contract provisions regarding appropriate time periods. *See, e.g.*, *Michael v. First Commer. Bank*, 69 Fed. Appx. 801 (7th Cir. 2003) (interpreting time periods in context of ERISA and insurance); *Crutcher v. Cockrell*, 301 F.3d 656 (5th Cir. 2002) (interpreting time periods related to a habeas petition); *Ponthie v. United States*, 98 Fed. Cl. 339, 346-48 (Fed. Cl. 2011) (interpreting terms and relevant time periods in a contract). This case is no different than any other matter interpreting such terms.

Moreover, Petitioners' reliance on *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013), is misplaced. *Gabelli* stands for the proposition that the discovery rule is not applicable to 28 U.S.C. § 2462 in an SEC civil penalty matter. However, the application of the discovery rule is not a question in this case, and here the United States is a victim and a party-in-interest to the recovery rather than merely seeking to enforce a civil penalty. The Court's concerns in *Gabelli* that a "judicially imposed discovery rule would lack" "an

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(President Barack Obama's Presidential Proclamation honoring troops who served in Iraq and stating that "on December 18, 2011, their mission came to an end").

absolute provision for repose" is not an issue in this case, *id.*, as both versions of the WSLA provide a precise time in which the limitations period is suspended after the termination of hostilities, *compare* 18 U.S.C. § 3287 (2006) *with* 18 U.S.C. § 3287 (2009 Supp.). *See also Gabelli*, 133 S. Ct. at 1224 ("the cases in which 'a statute of limitation may be suspended by causes *not mentioned in the statute itself* are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.'" (citation omitted) (emphasis added)). Moreover, in *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918), the Court applied the discovery rule where the Government was defrauded and sought recovery rather than merely attempting to enforce a civil penalty.

Additionally, the majority panel's decision is limited by the particular facts of the case and will not have far-reaching implications. This case specifically concerns a fraud that occurred during a war, in a war zone, and directly impacted United States troops fighting in that war. The panel applied the WSLA to a situation that Congress clearly intended under any interpretation of the statute – wartime fraud. Whether or not the Fourth Circuit or other circuit courts will apply the WSLA outside the limited facts of this case remains at best speculation since no other circuit court has addressed the issue. This Court does not grant certiorari based upon speculation about what courts may do in the future when no splits exist, *see McCray*, 461 U.S. at 963 (Stevens, J.) (denying

certiorari where the issue requires "further study" in the lower courts "before it is addressed by this Court"), and where the petition is interlocutory.

III. First-To-File

A. The Unanimous Fourth Circuit Panel Correctly Applied Existing Circuit Law to the Facts in This Case on First-to-File Grounds

The panel correctly decided that the district court's jurisdictional dismissal of the case should have been without prejudice. It is well settled that the first-to-file provision in 31 U.S.C. § 3730(b)(5) is jurisdictional and courts need not reach the merits of a case to consider such a challenge. *See United States ex rel. Branch Consultants v. Allstate Ins.*, 560 F.3d 371, 376 (5th Cir. 2009). The Fourth Circuit panel's unanimous decision therefore follows the law of other circuits and does not require review by this Court. *See United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362-65 (7th Cir. 2010) ("§ 3730(b)(5) applies only while the initial complaint is 'pending.'"); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963-64 (10th Cir. 2009) (explaining that the first-to-file bar no longer applies when the prior claim is no longer pending).

Petitioners recognized in moving to dismiss the complaint for lack of subject matter jurisdiction, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, that their first-to-file motion was jurisdictional and

not addressed to the merits.[9] They also recognized that they would not be entitled to a dismissal with prejudice unless the district court granted their motion addressed to the WSLA. In a well-placed footnote, Petitioners argued to the district court that: "This Court's previous dismissals under the first-to-file bar have been without prejudice, but there would be no point to a without prejudice dismissal now because, if Carter elects again to refile, he would be exceeding the statute of limitations for all of his FCA claims, as discussed in Section III, *infra*." *United States ex rel. Carter v. Halliburton Co.*, No. 11-cv-602 (E.D. Va. Oct. 21, 2011, redactions filed Dec. 7, 2011) (Doc. No. 47), at 13, n.5. Indeed, the district court took the hook and erroneously concluded: "Carter's suit is precluded by the first-to-file bar is, of course, dispositive. The Court addresses Defendants' statute-of-limitations argument because, in addition to

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[9] It is well settled that a dismissal under Rule 12(b)(1) solely for lack of subject matter jurisdiction is not an adjudication on the merits and is not a bar to a subsequent suit. *See Costello v. United States*, 365 U.S. 265 (1961) ("dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim."); *Ex parte McCardle*, 74 U.S. 506 (1869) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *Hughes v. United States*, 71 U.S. 232, 237 (1866) ("If the first suit was dismissed for . . the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."). Thus, to dismiss with prejudice under Rule 12(b)(1) is to disclaim jurisdiction and then exercise it.

providing an independent basis for dismissal of Carter's claims, it bears on whether or not dismissal should be with prejudice." Pet. App. at 64a n.8. After concluding that Carter's claims were time-barred, the district court dismissed the case *with* prejudice stating that the claims "would be untimely were Carter to again file a new action. And amendment of the complaint would provide no cure to the Court's lack of jurisdiction by virtue of the first-to-file bar." Pet. App. at 75a. Thus, its rationale for dismissing *with* prejudice was that the WSLA would preclude the filing of a new complaint.

The panel's decision, however, appropriately interpreted both the letter and intent of the first-to-file provision because the interpretation urged by Petitioners would result in permanent immunity from suit for any defendant based upon the filing of an inadequate, frivolous, or jurisdictionally defective complaint.[10] There is nothing in the panel's decision, or the case law Petitioners cite,[11] that supports

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[10] For instance, to the extent a "pending" complaint has not yet been challenged by a motion to dismiss, even if inadequate or defective, under section 3730(b)(5) that complaint bars not only Carter's complaint but any complaint by any appropriate relator. However, Petitioners urge an interpretation that goes beyond the statute; essentially, if a first-filed complaint were dismissed (either voluntarily, under Rule 9(b), or on jurisdictional grounds) all other potential relators would be barred from filing any future *qui tam* action involving the same fraud, thereby immunizing a defendant's fraudulent conduct on merely procedural grounds.

[11] Petitioners' citation to cases discussing the policy behind notice to the government is inapposite to this case and the

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Petitioners' argument that the unanimous panel is encouraging relators to endlessly re-plead claims even if the claims were litigated in other cases and put the government on notice. As the panel stated, "[a]lthough the doctrine of claim preclusion may prevent the filing of subsequent cases, § 3730(b)(5) does not." Pet. App. at 21a. Moreover, there are other provisions in the FCA that address public disclosure. The panel's decision clearly tracks the plain language of the FCA, which provides that "[w]hen a person brings an action under [the FCA] no person other than the Government may intervene or bring a related action based on the facts underlying the *pending* action." 31 U.S.C. § 3730(b)(5) (emphasis added).

The petition for certiorari can be reduced to a request that this Court read the word "pending" out of § 3730(b)(5), something that the district court and

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panel's analysis of section 3730(b)(5). *See United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (discussing whether first-filed complaints must meet Rule 9(b) to bar later complaints); *United States ex rel. Sanders v. N. Am. Bus. Indus.*, 546 F.3d 288, 295 (4th Cir. 2008) (discussing the FCA's statute of limitations in section 3731(b)(2)); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) (discussing its rationale for rejecting the "identical facts" test over the "essential claim" or "same material elements" test); *United States ex rel. St. John LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) (discussing its rejection of the "identical facts" test); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 570 (10th Cir. 1995) (discussing the FCA's public disclosure bar in section 3730(e)(4)).

Fourth Circuit correctly refused to do. Petitioners' claim that Congress's use of the word "pending" was not to impose any time limitation and was merely a "drafting short-hand" to distinguish between the first-filed action and a subsequent action flies in the face of the law, including cases by this Court, that require courts to interpret statutes based upon their plain meaning. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 552-53 (1987) ("When statutory language is plain, and nothing in the Act's structure or relationship to other statutes calls into question this plain meaning, that is ordinarily 'the end of the matter.'" (citation omitted)). Accordingly, Petitioners' reliance on an unreported opinion from the Northern District of Georgia, concerning its interpretation of the word "pending" in § 3730(b)(5), to invoke this Court's jurisdiction is misplaced. Pet. Br. 29 (citing *United States ex rel. Powell v. Am. Intercontinental Univ. Inc.*, No. 1:08-cv-2277, 2012 U.S. Dist. LEXIS 97587, at *13-18 (N.D. Ga. July 12, 2012)). Notably, the district court in *Powell* incorrectly asserted that this was an issue of first impression and failed to consider the circuit law in *Chovanec* and *In re Natural Gas Royalties*. *Id.* at *17. In relying upon *Powell*, Petitioners' arguments go far beyond the Fourth Circuit panel's unanimous holding. Taking Petitioners' arguments to their logical conclusion would compel that all dismissals under the first-to-file jurisdictional bar would be with prejudice and would lead to the untenable result that all other relators would be precluded from filing a complaint

after a first-filed complaint was dismissed for any reason, including a voluntary dismissal.

Boiled down, Petitioners' arguments for a writ of certiorari amount to nothing more than policy arguments concerning their dissatisfaction with the panel's unanimous first-to-file decision and are more appropriately the province of congressional lobbying. According to this Court's Rule 10, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Accordingly, Petitioners present no compelling reason or important question to grant the petition for writ of certiorari.

B. The Panel's "First-to-File" Holding Follows the Decisions of the Circuits

Not only is there no circuit split, but every circuit that has considered this narrow first-to-file issue has come to the same conclusion as the Fourth Circuit panel's conclusion that the bar of 31 U.S.C. § 3730(b)(5) does not apply to an action filed *after* the prior action is no longer "pending." *See Chovanec*, 606 F.3d at 362-65; *In re Natural Gas Royalties*, 566 F.3d at 963-64; *see also United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) ("The statutory text imposes a bar on complaints related to earlier-filed, 'pending' actions. The command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed."). The

panel specifically held that "[a]lthough the doctrine of claim preclusion may prevent the filing of subsequent cases, § 3730(b)(5) does not." Pet. App. at 21a. Accordingly, once a first-filed "case is no longer pending the first-to-file bar does not stop a relator from filing a related case. The first-to-file bar allows a plaintiff to bring a claim later; this is precisely what a dismissal without prejudice allows a plaintiff to do as well." Pet. App. at 22a. Petitioners do not identify a circuit split, indeed there is no circuit split, therefore there is nothing for this Court to review.

Petitioners do not cite any circuit cases that expressly conflict with the Fourth Circuit panel's decision on this issue. Instead, many of their citations are not relevant to whether the first-to-file bar precludes a later-filed action when the prior action is no longer "pending."[12] For instance, Petitioners

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[12] Petitioners' attempt to distract the Court with the rules regarding amendments to complaints and the relation back doctrine, which are irrelevant to the facts of this case and the § 3730(b)(5) analysis. *See Makro Capital of Am., Inc. v. UBS AG*, 543 F.3d 1254, 1259-60 (11th Cir. 2008) (holding that Rule 15's relation back doctrine did not permit a new *qui tam* claim in an amended complaint to relate back to the original complaint that contained no *qui tam* allegations and sought personal recovery for a fraud); *United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 14-15 (D.D.C. 2003) (holding that a relator's entirely new kickback allegations did not relate back to the original complaint's filing date because they were distinctly different claims, and, therefore, placed her new kickback allegations after those of a complaint filed later than the original complaint, but containing the same kickback allegations and filed before her amendment). As these cases and

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incorrectly claim that *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001), is illustrative. It is not illustrative of anything other than the Ninth Circuit's holding that § 3730(b)(5)'s plain language barred the relator's action while the prior-filed action was pending. *Id.* In *Lujan*, notwithstanding the dismissal of the first-filed case, the first-filed case was still pending when the relator initiated her action. *Id.*

Petitioners' reliance on *Branch Consultants*, 560 F.3d at 378, is similarly misplaced. That case involved the question of how to interpret first-to-file doctrine and whether a pending case was first-filed. There, the court was focused on whether the essential or material elements of a fraud claim were described in the same way in two complaints, *id.* at 378, and was not presented with a factual situation involving a dismissal with prejudice or whether a case could be filed after a first-filed pending case was dismissed. In fact, the Fifth Circuit recognized that this issue was not before it and declined to reach the issue. *Id.* at 379.

Petitioner is also incorrect in asserting that *United States ex rel. Duxbury v. Ortho Biotech Prods.*,

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the procedural history of this case demonstrate, there are other legal obstacles, such as the relation back doctrine and the statute of limitations, that impact whether a relator can proceed with a claim. However, those are not at issue here.

L.P., 579 F.3d 13, 32-34 (1st Cir. 2009), supports their position. *Duxbury* did not involve a dismissal of a prior suit before the date of a subsequent complaint. *See id.* at 32. It involved a complaint that was amended, after a second-filed action was voluntarily dismissed and unsealed, to add an additional relator and additional allegations similar to those publicly disclosed in the dismissed second-filed action. *Id.* at 17-20, 28, 32-34. There the court held that the first-to-file bar precluded claims asserted for the first time in an amended complaint that was filed after another relator had filed a complaint alleging similar off-label promotion claims. *See id.* at 32-34; *see also United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 551 F. Supp. 2d 100, 110-14 (D. Mass. 2008).

The relevant inquiry for the Court is whether there are any discrepancies among the circuit courts to justify granting a writ of certiorari. The panel's decision was correct – it followed the decisions of the Seventh and Tenth Circuit Courts of Appeals. Petitioners' argument that the word "pending" should be read out of 31 U.S.C. § 3730(b)(5) is an argument more appropriately made to Congress and is not worthy of review by this Court. *See Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1106-07 (2006) (Stevens, J., respecting denial of certiorari). Under this set of facts and the holding of the Fourth Circuit panel, we respectfully submit that this matter is unworthy of review by this Court.

CONCLUSION

This interlocutory petition raises no new significant or important issues. The Fourth Circuit panel's well-considered opinion on these issues, involving a fraud against troops in a war zone, is fully consistent with existing precedent for which there is no circuit split. For the foregoing reasons, review by this Court is both unnecessary and unwarranted. Respectfully, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL, PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent cannot dispute that the False Claims Act ("FCA") is a statute of exceptional importance whose interpretation this Court has revisited frequently. *E.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885 (2011); *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280 (2010); *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928 (2009). Nor can he dispute that the issues presented—application of statutes of limitation[1] and the FCA's bars to actions[2]—are important. While respondent quibbles about the extent of confusion over these issues, Opp. 12-14, 22-25, as the Fourth Circuit itself recognized, "courts are in conflict," Pet. App. 10a. Respondent opposes review principally because of *timing*: Although "numerous courts [have] considered the issue[s]" *already*, respondent makes a shopworn plea for further "percolat[ion]." Opp. 9, 13, 12. And because respondent's oft-dismissed lawsuit may have still other infirmities, he argues this case "is not yet ripe." *Id.* at 1.

Those strained efforts cannot disguise the fact that a splintered panel of the U.S. Court of Appeals with jurisdiction over most government contractors, Pet. 23, has held, contrary to the decisions of other federal courts, that a *criminal code* provision suspending statutes of limitations for fraud "offenses"

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[1] See, *e.g.* *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (noting "importance of time limits on penalty actions"); cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 354 (1991) (limitations period is "important issue").

[2] See *Schindler Elevator*, *supra* (public disclosure bar); *Graham Cnty.*, *supra* (same).

when prosecutors are distracted by war also applies to civil FCA suits brought by private relators who face no such distractions. And the panel applied tolling so broadly as to suspend limitations for *every* case of alleged fraud against the government, war-related or not, since at least 2001 and into the foreseeable future—until the President or Congress formally terminates all hostilities worldwide. It would be difficult to invent a more sweeping, and troubling, holding, yet there is more: The Fourth Circuit also held that a statutory bar on "copycat actions that provide [the government] no additional material information," *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011), instead allows relators to file an infinite series of identical suits, so long as only one is pending at a time. With no straight-faced argument that these issues are insufficiently important to merit this Court's attention, respondent halfheartedly suggests they may not "even recu[r]," Opp. 12. But of course they do, frequently—including in numerous filings *just during the pendency of this case.*[3]

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[3] See, e.g., Pet. 21-22 & n.5 (WSLA cases); Second Amended Complaint ¶¶ 2-3, 41, *United States ex rel. O'Keefe* v. *Pfizer, Inc.*, No. 11-cv-10065 (D. Mass. June 6, 2013) (citing decision below for proposition that nation "is still at war" and invoking WSLA for $1 billion in Medicaid/Medicare claims dating to 1997); Complaint, *United States ex rel. Paradise* v. *Mass. Gen. Hosp.*, No. 1:13-cv-11070 (D. Mass. May 8, 2013) (citing WSLA in alleging FCA violations related to medical treatment dating to 1996); *United States ex rel. Shea* v. *Cellco P'ship*, No. 12-7133 (D.C. Cir.) (reviewing first-to-file dismissal with prejudice) (scheduled for argument Nov. 26, 2013).

Sooner or later, this Court will have to resolve the two critical questions presented; the only issue is how many hundreds of millions of dollars American businesses must first devote to the "tremendous expenditure of time and energy" necessary to defend stale, non-intervened *qui tam* claims, Todd J. Canni, *Who's Making False Claims, The* Qui Tam *Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 11 n.66 (2007), which as a class are overwhelmingly meritless, see Chamber Amicus Br. 13. At a minimum, the Court should seek the views of the Solicitor General because the issues here fundamentally affect the government's relationship with its contractors. Doing so would also provide beneficial public notice about the government's views on tolling of civil fraud claims.

A. The Fourth Circuit's Sweeping WSLA Ruling Is Wrong

Respondent contends that by deleting two words—"now indictable"—from a tolling provision originally limited to criminal prosecutions, a minor 1944 amendment "specifically broadened the language of the WSLA to include civil offenses." Opp. 7 n.5. But as the petition explained (Pet. 14), Congress included those words to avoid reviving *already lapsed* statutes of limitations, and deleted them as redundant given other language specifying that tolling "shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law." Contract Settlement Act of 1944, 58 Stat. 649, 667. (The latter sentence was deleted in 1948, and the provision has since applied only to the narrower term "offense[s]." Act of June 25, 1948, 62 Stat. 828.) But Congress does not fundamentally "transform the scope" of a

criminal statute through such a minor, ambiguous change. *Wimberly* v. *Labor & Indus. Relations Comm'n*, 479 U.S. 511, 518-519 (1987).[4]

Respondent also ignores subsequent amendments. In 1948, when Congress permanently added the WSLA to the U.S. Code—in its *criminal title*—a neighboring provision defined "offense" to mean *only* "felon[ies]" and "misdemeanor[s]": i.e., *crimes*.[5] The suggestion (Opp. 8-9, 12) that Congress could have *even more* explicitly limited the WSLA to crimes ignores that the *ordinary meaning* of "offense" is a crime, Pet. 2, 13—indeed, the Criminal Code's *entire chapter* addressing limitations uniformly uses "offense" to describe only crimes. See 18 U.S.C. §§ 3281-3301.

Respondent downplays the decision's sweeping consequences by suggesting, without citation, that it is "limited by the particular facts of th[is] case." Opp. 16.[6] But the majority did not mention or rely on "lim-

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[4] Respondent's 1950s district court cases (Opp. 9) involved the United States as a party and did not contemplate the implications of tolling in an era of undeclared conflicts; some did not consider whether the WSLA applies in civil cases, *e.g.*, *United States* v. *Murphy-Cook & Co.*, 123 F. Supp. 806 (E.D. Pa. 1954).

[5] The statute provided that "[a]ny offense punishable by death or imprisonment for a term exceeding one year is a felony" and that "*[a]ny other* offense is a misdemeanor." Act of June 25, 1948, ch. 645, 62 Stat. 683, 684 (then codified at 18 U.S.C. § 1 (repealed 1984)) (emphasis added).

[6] While respondent breathlessly claims "massive fraud" "impact[ing] the troops" and involving a "failure to purify water" (Opp. 2, 1, i), he long ago abandoned "contaminated water" claims for his current timekeeping allegations (Pet. 6). The Justice Department met both claims with a collective yawn, repeat-

it[ing]" facts. Compare Pet. App. 8a-16a, with Opp. 16. Rather, it held sweepingly that "the WSLA applies to civil claims," Pet. App. 14a; that "relator-initiated claims" are not "excluded from the * * * WSLA," *id.* at 16a; and "the Act does not require a formal declaration of war," *id.* at 11a.

Assurances that the case is limited to "fraud that occurred * * * in a war zone" (Opp. 16) ring hollow. The statute contains no such limitation. It is hardly "speculation" (Opp. 16) that the WSLA will be applied outside the defense context: Respondent himself identifies such cases, *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 600-608 (S.D. Tex. 2012) (cited at Opp. 9, 10), and the government and private plaintiffs have frequently invoked it in suing industries as diverse as financial services and healthcare. See Chamber Amicus Br. 12; Pet. 22 & n.5; n.3, *supra*; Reed Albergotti, *U.S. Uses Wartime Law to Push Cases into Overtime*, Wall St. J., Apr. 16, 2013, at C1.

Respondent's tactical renunciation of indefinite tolling (Opp. 14) conflicts with his longstanding position. See Pet. App. 44a ("Before the district court, Carter argued that hostilities in Irac have not formally ended, meaning that the limitations would still be tolled today"). Respondent lodged a brief that invoked the (even-longer-running) Afghanistan conflict, asserting that "[t]he WSLA by its terms does not demand that the nation be at war with the country where the violation of the FCA occurred." Relator's Mot. for Leave to File Sur-Reply, Ex. 1, at 13 n.5

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edly declining to intervene after a full investigation. See Pet. App. 52a.

(E.D. Va. Nov. 11, 2011, redactions filed Dec. 8, 2011) (Doc. 54). Respondent suggests that the proclamation of a "National Day of Honor" for Iraq veterans ended that conflict, 77 Fed. Reg. 16,903, 16,905 (Mar. 22, 2013), but does not explain how it observed the necessary formalities, Opp. 14-15. The government has successfully invoked the WSLA against a financial-services company for conduct having nothing to do with any war, asserting that the Iraq and Afghan conflicts continue. Gov't Opp. to Mot. to Dismiss 7, *United States* v. *BNP Paribas*, No. 4:11-cv-03718 (S.D. Tex. Mar. 20, 2012).

Review is warranted to prevent the "dire effects," Pet. App. 46a (Agee, J., concurring in part and dissenting in part), of the statute of limitations having "not even begun to run on any * * * possible fraud claims" since September 2001 (Pet. 3-4, 115 Stat. 224 (Sept. 18, 2001)), which creates "unpredictable liability for aged claims" and imposes "ever-increasing [defense] costs" on U.S. industry. Chamber Amicus Br. 4, 6, 10.

B. The Panel Exacerbated A Recognized Conflict Of Authority

Respondent does not dispute that this Court's only decisions construing the WSLA require it be "narrowly construed" as "an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law," *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953). See Pet. 10-14. Reciting the facts of *Bridges* and *United States* v. *Smith*, 342 U.S. 225 (1952), see Opp. 9-10, does not displace their general interpretative principles. Pet. 10-13. The suggestion (Opp. 15-16) that *Gabelli* v.

SEC, 133 S. Ct. 1216 (2013), is relevant only to a "discovery rule" ignores its explicit statement that the FCA's 10-year statute of repose is "absolute," *id.* at 1224, and courts' widespread recognition that "*Gabelli* tells us not to read statutes in a way that would abolish effective time constraints on litigation." *United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013) (Easterbrook, J.).

The majority acknowledged that "courts are in conflict" about "whether the pre-amendment WSLA requires a formal declaration of war or whether the authorized use of military force shall suffice," Pet. App. 10a, which petitioner's own cases confirm. See *BNP Paribas*, 884 F. Supp. 2d at 601 ("[c]ourts are * * * in conflict" on this issue). The non-germane procedural history respondent recites (Opp. 13-14 & nn.6-7) does not resolve that conflict.[7] Respondent also ignores decisions limiting the WSLA to criminal cases.[8] This Court has repeatedly granted review to resolve similar conflicts. *E.g.*, *Murphy Bros.* v. *Mi-*

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[7] *United States* v. *Anghaie*, No. 1:09-cr-37, 2011 WL 720044 (N.D. Fla. Feb. 21, 2011), rejected application of the WSLA and dismissed counts as untimely. The Eleventh Circuit later remanded for fact-finding on an unrelated jury issue. *United States* v. *Anghaie*, No. 12-10086, 2013 WL 2451168 (11th Cir. June 7, 2013). The government in *United States* v. *Western Titanium, Inc.*, No. 08-cr-4229, 2010 WL 2650224 (S.D. Cal. July 1, 2010), dismissed charges against individual defendants only after the district court rejected WSLA tolling and dismissed other counts as untimely.

[8] *E.g.*, *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952); cf. *United States ex rel. Emanuele* v. *Medicor Assocs.*, No. 10-cv-245, 2013 WL 3893323, at *7 (W.D. Pa. July 26, 2013) (WSLA inapplicable to non-intervened civil FCA actions).

chetti Pipe Stringing, Inc., 526 U.S. 344, 349 & n.2 (1999) (conflict between courts of appeals and district courts); *Heffron* v. *Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 646 n.9 (1981) (same).

C. Respondent's Shifting Rationales For A "One-Case-At-A-Time" Rule Are Meritless

Until now, respondent's principal argument was that because 31 U.S.C. § 3730(b)(5) provides that "an action under [the FCA]" bars any "related action based on the facts underlying the pending action," the bar ends when a prior claim is no longer "pending." Perhaps appreciating that the words "pending action" impose no explicit time limit, but by their terms simply identify *which facts* no longer remain for a private relator to pursue, see Pet. 28-30, respondent has abruptly downgraded this theory to a secondary role. Opp. 20-22.

Respondent's *new* principal argument—that a dismissal for lack of jurisdiction categorically cannot be "with prejudice," Opp. 17-18 & n.9—fares no better.[9] It simply *assumes* the matter in dispute—that Congress intended a first-to-file dismissal to be "[c]urable." See, *e.g.*, *United States ex rel. Poteet* v. *Bahler Med., Inc.*, 619 F.3d 104, 115 (1st Cir. 2010) (rejecting argument that jurisdictional dismissal under FCA's "public disclosure" bar must be without prejudice; collecting authorities). Courts routinely—and validly—dismiss matters with prejudice under

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[9] Contrary to respondent's suggestion (Opp. 17-18), petitioners argued below that the bar operates even "after the first-filed suit is dismissed." Mem. in Support of Mot. to Dismiss 6 (E.D. Va. Oct. 21, 2011, redactions filed Dec. 7, 2011) (Doc. No. 47).

the FCA's jurisdictional "public disclosure" bar. See, *e.g.*, *ibid.*; *United States ex rel. Zizic* v. *Q2Administrators, LLC*, No. 12-2215, 2013 WL 4504765 (3d Cir. Aug. 26, 2013). Other examples abound.[10]

Respondent also now suggests that precluding "copycat [relator] actions that do not provide [the government] additional material information" about fraud, *Batiste*, 659 F.3d at 1210, creates "immunity" from suit. Opp. 19. But that is flatly wrong: Because the bar prohibits *only* an action by a "person other than the Government," the United States remains free to pursue FCA claims. 31 U.S.C. § 3730(b)(5).

Respondent strains to reconcile this decision with those of other circuits, Opp. 24-25, but there is little question this case would have been decided differently in those courts. Respondent would limit *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001), to its facts, Opp. 23-24, but as a leading treatise recognizes, "the rationale for the court's decision applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.03[C][2][b] (4th ed. CCH 2012). *Hughes* recogniz-

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[10] See, *e.g.*, *Calcano-Martinez* v. *INS*, 533 U.S. 348, 352 (2001) (Scalia, J., dissenting) ("I would vacate the judgment of the court below and remand with instructions to dismiss for want of jurisdiction, with prejudice * * *."); *Styskal* v. *Weld Cnty. Bd. of Cnty. Comm'rs*, 365 F.3d 855, 857 (10th Cir. 2004) (upholding dismissal of state-law claims "with prejudice," where court lacked supplemental jurisdiction).

es that the first-to-file bar is "exception-free" and "prevent[s] * * * related actions" after the "first-filed claim provides the government notice of the essential facts of an alleged fraud." 243 F.3d at 1187.

Respondent's disjointed account of *United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13 (1st Cir. 2009), Opp. 24-25, cannot obscure the essential sequence of events: The plaintiff filed an amended complaint that first alleged *qui tam* claims. The First Circuit affirmed the dismissal of those claims under the first-to-file bar because another plaintiff had alleged similar claims in another case, *which had been dismissed before the amended complaint was filed. Id.* at 32-34 A relator cannot avoid that rule merely by filing a new, rather than amended, complaint.[11] Finally, respondent invokes inapposite facts of *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371 (2009), Opp. 24, but has no response to the Fifth Circuit's express disapproval of "an infinite number of copycat *qui tam* actions" or conclusion that "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *Id.* at 378.

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[11] While respondent seeks to distinguish *Makro Capital of Am., Inc.* v. *UBS AG*, 543 F.3d 1254 (11th Cir. 2008), as involving an amended complaint rather than re-filing the same complaint, Opp. 23 n.12, respondent cannot sidestep that court's refusal to "defeat the purpose of [the first-to-file bar] by allowing multiple private suits." 543 F.3d at 1260.

D. Immediate Review Is Appropriate

An interlocutory posture does not bar review of an "important and clear-cut issue of law that is fundamental to the further conduct of the case," including where "the court of appeals had reversed the granting of a motion to dismiss and had ordered the case remanded for trial." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (collecting authorities); accord *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 160 (2004) (vacating denial of a motion to dismiss). This Court recently exercised certiorari jurisdiction where it had "significant disagreement with the [court of appeals]," *Morgan Stanley Capital Grp. Inc.* v. *Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 552 (2008), even where the Solicitor General recommended denial given "the interlocutory nature of th[e] issues," *id.* at 555 (Ginsburg, J., concurring in part and concurring in the judgment). Respondent identifies no factual issue that further delay would "illuminate" (Opp. 6) for later appellate review.

District court action will not moot this case during this Court's review. Contra Opp. 6. Any dismissal on alternate grounds would not affect jurisdiction until it is upheld on appeal and this Court denies certiorari or affirms. See *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). There is no realistic prospect that some future appeal would be complete before the Court decided this matter; the current appeal has already taken 20 months. And the possibility that petitioner could ultimately prevail on another ground is no obstacle to resolution of the questions presented here. See Pet. 31 n.8.

This case's torturous procedural history underscores the need for prompt review. Respondent began this litigation in early 2006, alleging conduct dating to 2005, and has repeatedly re-filed the same complaint after numerous dismissals. Absent this Court's intervention, respondent may continue to do so for years—or decades—to come.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, EX REL.
BENJAMIN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

1. Whether the Wartime Suspension of Limitations Act, 18 U.S.C. 3287, applies to a civil fraud claim brought by a private relator under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*

2. Whether the FCA's "first-to-file" provision, 31 U.S.C. 3730(b)(5), bars a relator from filing a new *qui tam* suit when a *qui tam* action raising similar allegations has been filed, but subsequently dismissed on non-merits grounds, before the new suit is commenced.

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In the Supreme Court of the United States

No. 12-1497

KELLOGG BROWN & ROOT SERVICES, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, EX REL.
BENJAMIN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, a false or fraudulent claim" to the government "for payment or approval." 31 U.S.C. 3729(a)(1)(A). The Act authorizes both the government and private persons to sue for violations. See 31 U.S.C. 3730(a) and (b). Under the FCA's limitations provision, suit must

be brought within six years of the date of the violation, or within three years of the date the material facts were known or should have been known to the responsible government official (so long as the suit is brought within ten years of the violation). 31 U.S.C. 3731(b).

When a private person (known as a relator) brings a lawsuit (known as a *qui tam* action), the government may intervene and proceed with the action or may decline to intervene and allow the relator to proceed. See 31 U.S.C. 3730(b)(1)-(4) and (c). In either event, any recovery is divided between the relator and the government. See 31 U.S.C. 3730(d). The FCA provides that, when a relator brings a *qui tam* action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). Section 3730(b)(5) is commonly known as the FCA's "first-to-file" provision.

b. The Wartime Suspension of Limitations Act (WSLA), originally enacted during World War II,[1] suspends the statute of limitations in certain circumstances while the United States is engaged in military operations. As amended most recently in 2008, the WSLA provides in relevant part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, * * * the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by

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[1] See Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.

> conspiracy or not, * * * shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

18 U.S.C. 3287. Congress enacted the WSLA to ensure "that the limitations statute will not operate, under stress of [wartime], for the protection of those who would defraud or attempt to defraud the United States." S. Rep. No. 1544, 77th Cong., 2d Sess. 2 (1942) (1942 Senate Report).

2. Petitioners provided logistical services to the United States military in connection with the armed conflict in Iraq. Pet. App. 3a. In 2005, respondent worked for petitioners on water-purification projects at two camps in Iraq. *Ibid.* Respondent alleges that petitioners instructed him to submit time sheets for time he did not work, and that it was "routine practice" for petitioners to overbill the United States government on these projects. *Id.* at 3a-4a.

In February 2006, respondent brought an FCA action against petitioners, alleging that they had fraudulently billed the government for work in Iraq. Pet. App. 4a, 48a-49a. The district court dismissed the complaint for failure to plead fraud with particularity, and respondent promptly re-filed the complaint. *Ibid.* One month before trial, the parties were alerted to the pendency of an arguably related suit, *United States ex rel. Thorpe* v. *Halliburton Co.*, No. 05-CV-08924 (C.D. Cal. filed Dec. 23, 2005), that had been filed before respondent's action. Pet. App. 4a-5a, 51a.

Petitioners moved to dismiss respondent's suit based on the FCA's first-to-file provision. Pet. App. 5a. The district court concluded that respondent's suit

was sufficiently "related" to *Thorpe* to trigger the first-to-file provision, and it dismissed respondent's complaint without prejudice. *Ibid.* Respondent appealed the dismissal of his complaint, and in the meantime, *Thorpe* was dismissed. *Ibid.*

Respondent then re-filed his FCA suit against petitioners. Pet. App. 5a. The district court again dismissed the complaint, based on the first-to-file bar, because respondent's first suit against petitioners was still pending on appeal when he filed the second suit. *Id.* at 5a-6a.

Respondent voluntarily dismissed his appeal in the first suit. In June 2011, he filed this action, again alleging that petitioners had fraudulently billed the government for services provided to the military in Iraq. Pet. App. 5a-6a, 48a. Petitioners moved to dismiss the complaint, arguing (1) that it is barred by the FCA's first-to-file provision because of the *Thorpe* action and a new case filed in Maryland (*United States ex rel. Duprey* v. *Halliburton, Inc.*, No. 07-CV-01487 (D. Md. filed June 5, 2007)), and (2) that most of respondent's claims are untimely under the FCA's six-year statute of limitations. Pet. App. 52a, 57a.[2]

3. The district court granted petitioners' motion to dismiss. Pet. App. 47a-76a. The court held that respondent's suit was barred by the first-to-file provision because *Duprey* was sufficiently "related" to the instant lawsuit and had been filed before the instant suit was commenced. *Id.* at 58a-64a. The court acknowledged that *Duprey* had been dismissed on

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[2] Petitioners also argued that the FCA's public-disclosure bar, 31 U.S.C. 3730(e)(4)(A), bars this lawsuit. Pet. App. 57a. Neither the district court (*id.* at 57a n.3) nor the court of appeals (*id.* at 22a) addressed that argument.

procedural grounds after this lawsuit was filed. *Id.* at 63a. It nevertheless dismissed respondent's complaint with prejudice, explaining that the application of the first-to-file bar depends on "the facts as they existed when the action was brought," and that *Duprey* "was pending when [respondent] filed the instant suit." *Id.* at 63a-64a.

The district court also held that most of respondent's claims are time-barred, rejecting respondent's argument that the WSLA applies to this action. Pet. App. 64a-75a. The court acknowledged that the term "offense" in the WSLA could apply to both criminal and civil violations of law, *id.* at 68a, and that many courts have interpreted the WSLA to apply to civil fraud violations, *id.* at 71a & n.17. The court held, however, that the WSLA should not apply in *qui tam* suits because the FCA's limitations provision distinguishes between *qui tam* suits and suits brought by the government, and because such application would undermine the FCA's purpose of "combat[ting] fraud quickly and efficiently" by "allow[ing] relators to sit on their claims." *Id.* at 73a-74a. Without deciding whether the WSLA applies to FCA suits brought by the government, the court concluded that it does not apply to "a civil FCA action brought by a relator, in which the United States has opted not to intervene." *Id.* at 74a.

4. The court of appeals reversed and remanded. Pet. App. 1a-23a.

a. The court of appeals held that the WSLA suspends the statute of limitations for respondent's claims. Pet. App. 8a-16a. The court observed that the statute's reference to "offense[s] * * * involving fraud" could include both criminal and civil violations,

and it concluded that Congress intended the WSLA to apply to both. *Id.* at 13a-14a. The court explained that, as first enacted in 1942, the WSLA had referred to offenses "now indictable," thus limiting the provision to criminal offenses, but that Congress had deleted that language in 1944, evidencing its intent to expand the WSLA to civil fraud offenses. *Id.* at 14a.

The court of appeals further explained that applying the WSLA to civil fraud offenses "furthers the WSLA's purpose," which is "to root out fraud against the United States during times of war." Pet. App. 16a. The court also observed that "all but one court to have considered the issue of whether the WSLA applies to civil claims have found that it applies." *Id.* at 14a (citation omitted). Finally, the court rejected petitioners' argument that the WSLA should be limited to FCA suits brought by the United States. The court explained that the suspension of limitations in the WSLA "depends upon whether the country is at war and not who brings the case." *Id.* at 15a; see *id.* at 15a-16a.

b. The court of appeals held that the FCA's first-to-file provision does not forever bar respondent's claims. Pet. App. 16a-22a. The court concluded that, because *Thorpe* and *Duprey* were pending when petitioner filed his June 2011 complaint, and those actions are sufficiently "related" to this lawsuit to trigger the first-to-file bar, respondent's complaint was properly dismissed. *Id.* at 19a-21a. The court further held, however, that the dismissal should have been without prejudice so that respondent could file a new lawsuit, since both *Thorpe* and *Duprey* had been dismissed. *Id.* at 21a. The court explained that the first-to-file bar applies only when a "related action" is "pending,"

and that "once a case is no longer pending," "the first-to-file bar does not stop a relator from filing a related case." *Id.* at 21a-22a.

c. Judge Wynn concurred, providing additional reasons why the WSLA applies to respondent's suit. Pet. App. 23a-31a. Judge Agee concurred in part and dissented in part, taking the view that the WSLA suspends the statute of limitations for civil claims only when the United States is a party. *Id.* at 31a-46a.

DISCUSSION

The court of appeals correctly held that the WSLA applies in a *qui tam* suit under the FCA because a civil FCA violation is an "offense * * * involving fraud * * * against the United States." 18 U.S.C. 3287(1). The term "offense" can refer to both criminal and civil violations of law, and the context, history, and purposes of the WSLA demonstrate that Congress intended to suspend the limitations period in times of war for all frauds against the United States. The court below also correctly recognized that the WSLA's applicability does not depend on whether a particular suit is brought by the government or by a private relator. There is no disagreement in the courts of appeals on the question whether the WSLA applies to *qui tam* suits or to civil FCA violations more generally. Accordingly, the first question presented does not warrant this Court's review.

The court of appeals also correctly held that the FCA's first-to-file provision does not apply if a previously-filed related case is no longer pending when a *qui tam* suit is commenced. That interpretation is consistent with the statute's plain language, which bars the instant action only when a "related action" is "pending," 31 U.S.C. 3730(b)(5), and it reasonably

balances the need to encourage prompt filing of FCA suits with the need to permit the adjudication of FCA claims on their merits. The courts of appeals have disagreed on the question whether the first-to-file bar applies in these circumstances, but that disagreement is a narrow one that soon may be resolved without this Court's intervention. Accordingly, review of the second question presented is not warranted at this time.

A. The Question Whether The WSLA Applies To Civil Fraud Claims Does Not Warrant This Court's Review

1. The court of appeals correctly held that the WSLA applies to both civil and criminal fraud offenses.

a. The WSLA broadly provides that, when the United States is at war or Congress has authorized the use of military force, "the running of *any* statute of limitations applicable to *any* offense * * * involving fraud or attempted fraud against the United States or any agency thereof *in any manner*, whether by conspiracy or not, * * * shall be suspended until 5 years after" the termination of hostilities. 18 U.S.C. 3287 (emphases added); see *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("any" is a term of "breadth"). The statute also encompasses additional categories of offenses involving government property and contracts. See 18 U.S.C. 3287(2) and (3). Congress thus defined the statute's coverage not by reference to the criminal or civil character of the underlying violation, but by reference to the substantive nature of the wrongdoing involved.

As both courts below recognized, the word "offense" can encompass both civil and criminal violations of law. See Pet. App. 13a-14a, 68a; see also, *e.g.*, *Black's Law Dictionary* 1186 (9th ed. 2009) (defining

"offense" as "[a] violation of the law; a crime, often a minor one" and providing examples of both criminal and civil "offenses"); *Webster's Third New International Dictionary* 1566 (1993) (defining "offense" as "an infraction of law" or "crime"). Numerous provisions of the United States Code use the word "offense" to refer to a civil violation. See, *e.g.*, 15 U.S.C. 45(*l*); 16 U.S.C. 1540(a)(1); 16 U.S.C. 3373(a)(4); 29 U.S.C. 2619(b); 33 U.S.C. 1321(b). This Court likewise has frequently used the term "offense" to describe civil violations of law. See, *e.g.*, *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009) (in an employment-discrimination case, referring to "Title VII offenses"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) (repeating the rule that "exemplary damages imposed on a defendant should reflect the enormity of his offense") (citation and internal quotation marks omitted); *Welsh* v. *Wisconsin*, 466 U.S. 740, 746, 751-754 (1984) (repeatedly referring to a civil traffic violation as a civil "offense").

In *United States* v. *Hutto*, 256 U.S. 524 (1921), the Court construed the federal criminal conspiracy statute, which then as now prohibited conspiracy "to commit any offense against the United States." *Id.* at 525 (quoting § 37, Criminal Code). The Court held that the statute applied to a conspiracy to violate a federal statute prohibiting federal Indian affairs employees from trading with Indians. See *id.* at 525, 528-529. The Court explained that the statute's reference to an "offense against the United States" "does not in terms require that the contemplated offense shall of itself be a criminal offense." *Id.* at 528. Rather, the Court concluded, the conspiracy statute proscribed

any "combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful." *Id.* at 529. That holding provides further evidence that the word "offense" is not limited to crimes, even when it appears within the Criminal Code.[3]

b. The WSLA's history confirms that Congress intended it to apply to both civil and criminal fraud offenses. Congress enacted the WSLA in 1942, in the midst of World War II.[4] As originally enacted, the WSLA provided that "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United

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[3] In light of subsequent amendments to the federal conspiracy statute, it is doubtful that the statute in its current form (18 U.S.C. 371) encompasses conspiracies to commit civil violations. Section 371 establishes a five-year maximum term of imprisonment for conspiring to commit an "offense against the United States," then states that if the "offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment * * * shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. 371. Congress's use of the term "misdemeanor" to describe less serious "offense[s]" suggests that Congress used the term "offense" in current Section 371 to mean "crime." But see *United States* v. *Wiesner*, 216 F.2d 739, 741-742 (2d Cir. 1954). But that simply shows that the term "offense" sometimes encompasses civil violations and sometimes does not, and that the particular context in which the term appears may help to clarify its meaning. Here, various contextual clues demonstrate that the term as it appears in the WSLA is not limited to crimes.

[4] Congress had enacted a similar provision following World War I, extending the statute of limitations for "offenses involving the defrauding or attempts to defraud the United States" from three years to six years. See Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220. Congress repealed that provision in 1927. See Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51.

States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate." Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.

Two years later, Congress amended the WSLA as part of the Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat. 649, 667. *Inter alia*, Congress changed the concluding clause of the statute, removing the language that had previously limited the WSLA to offenses "now indictable under any existing statutes." 56 Stat. 748. Under the amended version, the limitations period was suspended for qualifying offenses "until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress." § 19(b), 58 Stat. 667. As the court below explained, the "now indictable" language originally limited the WSLA's application to criminal fraud offenses, and the deletion of the "now indictable" language in 1944 made the WSLA "applicable to all actions involving fraud against the United States." Pet. App. 14a. If Congress had intended for the WSLA to continue to apply only to criminal offenses, it could have included some "limiting language" to make that point clear, *ibid.*, but Congress did not do so.

Congress's failure to include language limiting the WSLA to crimes is especially telling because the Contract Settlement Act was largely civil in nature. The Act's purpose was to ensure that government war contracts could be terminated, and creditors could be

paid, more quickly, in order to allow for a speedy transition from a wartime to peacetime economy. See § 1, 58 Stat. 649. Recognizing that such an expedited process would increase the opportunity for fraud, Congress included both criminal and civil provisions intended to better protect the government from fraud committed by wartime contractors. See § 19(c), 58 Stat. 667-668 (creating new criminal and civil offenses, including fine of $2000 per act and double damages, for presenting false claims for payment in connection with war contracts). Congress also established procedures for the Comptroller General to certify to the Department of Justice that a war contract settlement was induced by fraud, and it required each contracting agency to report to the Department of Justice "any settlement" with a war contractor that the agency believed "was induced by fraud," so that the Department could "take * * * action" to "recover payments made to such war contractor." §§ 16, 18(e), 58 Stat. 664-665, 666-667.

In the same 1944 enactment that removed the "now indictable" language, Congress also expanded the WSLA to reach any offense "committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement" of any contract connected to the war effort. § 19(b), 58 Stat. 667. Later that year, Congress expanded the WSLA's reach again, to apply to any offenses "committed in connection with the care and handling and disposal of property under the Surplus Property Act." Surplus Property Act of 1944, Pub. L. No. 78-457, § 28, 58 Stat. 765, 781. The overall context of the 1944 Acts reinforces the conclusion that Congress's removal of the "now

indictable" language was intended to expand the WSLA's reach to civil fraud, contracting, and procurement offenses.

Congress has not taken any action since 1944 to limit the WSLA's reach to crimes. Congress modified the statute in 1948, see Act of June 25, 1948, Pub. L. No. 80-772, § 3287, 62 Stat. 683, 828, "to make [the WSLA] permanent instead of temporary legislation," thereby "obviat[ing] the necessity of reenacting such legislation" for each future war, H.R. Rep. No. 304, 80th Cong., 1st Sess. A165 (1947). The 1948 amendments made no change, however, to the list of offenses that the WSLA covered. The WSLA remained unchanged from 1948 to 2008. In 2008, Congress amended the law to provide for suspension of limitations periods not only when the United States is "at war," but also when "Congress has enacted a specific authorization for the use of the Armed Forces," and to expand the suspension period from three years to five years after the termination of hostilities. Department of Defense Appropriations Act, 2009, Pub. L. No. 110-329, Div. C, § 8117, 122 Stat. 3574, 3647. Again, Congress did nothing to limit the offenses reached by the statute.

c. Applying the WSLA to civil FCA violations furthers the WSLA's purposes. The WSLA reflects Congress's recognition that frauds against the government committed during a time of war "may be difficult to discover" and "may not come to light for some time to come." 1942 Senate Report 2. Suspension of the limitations period ensures "that frauds may be discovered and punished even after the termination of the present conflict," and that the statute of limitations will not "protect[] * * * those who would

defraud or attempt to defraud the United States." *Ibid.* The Senate Report accompanying the Surplus Property Act of 1944 likewise explains that, due to "the intensive preoccupation of both participants and witnesses with the war effort," "the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war," and at that point, it will "require considerable time before they advance to the stage of litigation." S. Rep. No. 1057, 78th Cong., 2d Sess. 14 (1944) (1944 Senate Report).

Those rationales for suspending the limitations period in wartime fraud cases apply equally in the criminal and civil contexts. Fraud against the United States may be "difficult to discover," take time to "be apprehended or investigated," and "require considerable time" to "advance to * * * litigation" (1942 Senate Report 2; 1944 Senate Report 14), regardless of whether that fraud is ultimately prosecuted criminally or civilly. That concern is best addressed by construing the WSLA to apply to all suits alleging fraud against the United States, including both criminal prosecutions and civil FCA suits.

d. The court of appeals correctly held that the WSLA applies in FCA suits brought by *qui tam* relators. By its terms, the WSLA's applicability turns on the nature of the "offense" alleged, not on the identity of the plaintiff. The dissenting judge below relied in part on legislative history that described the difficulties federal law-enforcement officials would face in detecting and prosecuting frauds during wartime. See Pet. App. 41a-42a (Agee, J., dissenting). Because the WSLA applies to offenses involving fraud against the United States, or involving government property or

contracts, Congress naturally focused on the practical exigencies confronting federal officers. Nothing in the WSLA's text, however, provides a basis for distinguishing between civil FCA suits brought by the United States and those brought by private relators.

2. a. Every court of appeals to consider the question has held that the WLSA applies in civil fraud cases. See Pet. App. 13a-14a; *United States* v. *Hougham*, 270 F.2d 290, 292 & n.3 (9th Cir. 1959), rev'd on other grounds, 364 U.S. 310 (1960); *United States* v. *Witherspoon*, 211 F.2d 858, 860-863 (6th Cir. 1954). During the 1950s, numerous district courts addressed that issue, and they overwhelmingly reached the same conclusion.[5] The former Court of Claims also held that the WSLA applies to civil fraud claims. See *Dugan & McNamara* v. *United States*, 127 F. Supp. 801, 802-804 (Ct. Cl. 1955). Other than the district court in this case, which held that the WSLA does not apply to private *qui tam* suits, only one district court has found the statute inapplicable to civil cases. See *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), rev'd on other grounds, 207 F.2d 796 (5th Cir. 1953).

b. In 1959, the United States stated in a brief to this Court that the WSLA applies only to crimes. See U.S. Br. at 26-28, *Koller* v. *United States*, 359 U.S. 309

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[5] See *United States* v. *Temple*, 147 F. Supp. 118, 120-121 (N.D. Ill. 1956), rev'd on other grounds, 299 F.2d 30 (7th Cir. 1962); *United States ex rel. McCans* v. *Armour & Co.*, 146 F. Supp. 546, 550-551 (D.D.C. 1956); *United States* v. *Salvatore*, 140 F. Supp. 470, 473 (E.D. Pa. 1956); *United States* v. *Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955); *United States* v. *Covollo*, 136 F. Supp. 107, 109 (E.D. Pa. 1955); *United States* v. *Murphy-Cook & Co.*, 123 F. Supp. 806, 806 (E.D. Pa. 1954); *United States* v. *Strange Bros. Hide Co.*, 123 F. Supp. 177, 181-184 (N.D. Iowa 1954).

(1959) (No. 362). The WSLA was not at issue in that case, and the government's brief did not discuss either the sequence of enactments (including the deletion of the "now indictable" language) that had produced the WSLA in its then-current form, or the lower-court decisions (see note 5, *supra*) that had found the statute applicable to civil cases. The Court's summary disposition in *Koller* did not address the proper construction of the WSLA.

c. We are not aware of any published decision between 1959 and 2012 addressing the question whether the WSLA applies to civil fraud suits. The absence of such decisions is likely due at least in principal part to the fact that, until the WSLA was amended in 2008, there was substantial doubt whether the statute could apply absent a formal declaration of war. Since that amendment was enacted, the United States has successfully argued in two district courts that the WSLA applies in civil cases. See *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 612-614 (S.D.N.Y. 2013); *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 601-602 (S.D. Tex. 2012); see also *United States* v. *Movtady*, No. 13 Civ. 2227 (JMF), 2014 WL 1357330, at *5 n.4 (S.D.N.Y. Apr. 7, 2014) (district court reached same conclusion *sua sponte*); *United States ex rel. Carroll* v. *Planned Parenthood Gulf Coast, Inc.*, Civ. No. H-12-3505, 2014 WL 1933554, at *7 (S.D. Tex. May 14, 2014) (district court reached same conclusion in *qui tam* suit); *United States ex rel. Paulos* v. *Stryker Corp.*, Civil No. 11-0041-CV-W-ODS, 2013 WL 2666346, at *15 (W.D. Mo. June 12, 2013) (same). The Court's invitation in this case prompted a further reexamination within the government of the question presented here. The government

has concluded that, in light of the current text of the WSLA, the development of the statute's language over time, and the case law construing the provision, the WSLA should be interpreted to apply to both criminal and civil fraud offenses. Because this is the uniform view of the courts of appeals, no further review of the issue is warranted.

3. The court below also concluded that, for purposes of the pre-2008 version of the WSLA, the United States had been "at war" in Iraq since October 11, 2002, when Congress enacted an Authorization for the Use of Military Force against Iraq (AUMF). Pet. App. 12a. Although the petition contains passing criticisms of that holding (Pet. 13, 16), the timeliness of respondent's suit does not depend on whether the prior version of the FCA required a formal declaration of war. Because respondent alleges FCA violations occurring in 2005, see Pet. App. 3a, the FCA's six-year limitations period had not expired when the WSLA was amended in 2008. And under the WSLA in its current form, the limitations period in covered cases is suspended "[w]hen the United States is at war *or Congress has enacted a specific authorization for the use of the Armed Forces*." 18 U.S.C. 3287 (emphasis added).

The 2008 WSLA amendment thus operated to suspend the FCA's limitations period in this case, whether or not that period had previously been running under the pre-amendment version of the WSLA. And because the 2008 amendments clarified going forward that the AUMF and similar congressional authorizations can trigger the WSLA, the proper interpretation of the phrase "at war" in the prior version of the statute is of no continuing importance.

B. The Question About The FCA's First-To-File Provision Does Not Warrant This Court's Review

1. The court of appeals correctly held that the FCA's first-to-file provision applies only when a related suit is "pending" at the time the relator files her action. See Pet. App. 20a-22a.

a. The first-to-file provision states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). By Section 3730(b)(5)'s plain terms, a *qui tam* suit is barred when a "related action" is "pending." Under usual understandings of the word, a matter is "pending" if it "remain[s] undecided," is "awaiting decision," or is "under consideration." *Black's Law Dictionary* 1248 (9th ed. 2009); see *Carey* v. *Saffold*, 536 U.S. 214, 219-220 (2002) (stating that the "ordinary meaning" of "pending" is "in continuance" or "not yet decided" (citation omitted)). And under that ordinary meaning, a civil action ceases to be "pending" when it is dismissed by the trial court. Once a related first-filed action is no longer "pending," the FCA's first-to-file bar is inapplicable by its terms.

Although the district court recognized that the first-to-file bar applies only when a related action is "pending," it dismissed respondent's complaint with prejudice because two related cases had been pending when respondent filed suit in June 2011. Pet. App. 63a-64a. As the court of appeals explained, however, both of those related actions have since been dismissed, and so neither is "pending" now. *Id.* at 21a-22a. Because no first-filed action is currently "pend-

ing," the court of appeals correctly held that petitioner is "entitled to file a new complaint." *Id.* at 63a-64a.

b. Limiting the first-to-file bar to situations where the first-filed action remains "pending" makes good sense. A key purpose of the first-to-file provision is to "encourag[e] whistleblowers to come forward by rewarding the first to do so." *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005). The first-to-file bar furthers that purpose by precluding a relator from filing a new action while a related action is pending, thereby protecting the first relator from either a race to judgment or dilution of any recovery his suit might produce. See, *e.g.*, *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) (if "dozens of relators could expect to share a recovery for the same conduct" it would "decreas[e] the[] incentive to bring a *qui tam* action in the first place"). When a relator seeks to file a suit based on the same facts as a pending action, the first-to-file bar also protects the defendant from facing multiple, simultaneous *qui tam* actions regarding the same alleged misconduct.

Neither of those rationales for precluding follow-on *qui tam* suits applies, however, after the first-filed action has been dismissed. Once the initial suit has been dismissed, the first relator has no continuing interest in avoiding dilution of his (now hypothetical) recovery, and the defendant no longer faces the prospect of multiple pending suits. If the first-filed action has been decided *on the merits*, "the doctrine of claim preclusion may prevent the filing of subsequent cases." Pet. App. 21a. But there is no sound reason that a *non-merits* dismissal should preclude a subse-

quent *qui tam* suit brought by a relator who otherwise satisfies the FCA's requirements.

Petitioners assert (Pet. 29) that the court of appeals' interpretation of the first-to-file bar "undermines the statutory purpose of helping the government promptly to pursue fraud" because relators will have "no incentive * * * to file promptly" under the court of appeals' reading of Section 3730(b)(5). That argument is misconceived. If the first relator's allegations are publicly disclosed in the course of the suit, the second relator's complaint may be subject to dismissal under the FCA's public-disclosure bar, 31 U.S.C. 3730(e)(4)(A), even if the first suit is dismissed on non-merits grounds. See *United States ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010). A potential relator also cannot predict how or when an earlier-filed suit will be resolved or whether that resolution will have preclusive effect in a later-filed suit. A potential relator thus has ample incentives to make every effort to be the first to file, even if Section 3730(b)(5) is construed (according to its terms) to require a "pending" suit.

2. The courts of appeals have disagreed on the question whether the first-to-file provision applies when no action involving the same underlying facts remains "pending" when the relator files her suit. The court below held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." Pet. App. 22a; see *United States ex rel. May* v. *Purdue Pharma L.P.*, 737 F.3d 908, 920 (4th Cir. 2013), petition for cert. pending, No. 13-1162 (filed Mar. 25, 2014). The Seventh Circuit has agreed that the first-to-file provision "applies only while the initial complaint is 'pending,'" *Chovanec*, 606

F.3d at 365, and the Tenth Circuit has stated the same view in dicta, see *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 963-964 (10th Cir. 2009) ("[I]f that prior claim is no longer pending, the first-to-file bar no longer applies.").[6] In *United States ex rel. Shea* v. *Cellco Partnership*, No. 12-7133, 2014 WL 1394687 (D.C. Cir. Apr. 11, 2014), however, the D.C. Circuit recently took the opposite view, holding that "the first-to-file bar applies even if the initial action is no longer pending." *Id.* at *4-*6.[7]

The disagreement in the circuits is a narrow one that may resolve itself without this Court's intervention. The D.C. Circuit's decision in *Shea* was issued by a divided panel. Judge Srinivasan dissented in

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[6] The Ninth Circuit has held that the first-to-file bar is inapplicable when the first-filed suit was dismissed under the FCA's public-disclosure bar, 31 U.S.C. 3730(e)(4)(A), but the second relator qualifies as an "original source" and therefore is not subject to the public-disclosure bar. See *Campbell*, 421 F.3d at 821-822. In a prior case, the Ninth Circuit applied the first-to-file bar when the related action was pending at the time the new complaint was filed but subsequently was dismissed, without addressing whether the relator may re-file her claim. See *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir.), cert. denied, 543 U.S. 1040 (2001).

[7] The other cases cited by petitioners (Pet. 24-26) are inapposite. For example, *United States ex rel. Branch Consultants* v. *Allstate Insurance Co.*, 560 F.3d 371 (5th Cir. 2009), addressed whether a previously-filed suit was "related" to the present suit, not whether the first-to-file bar applies when a related case is no longer pending. *Id.* at 378. Although *United States ex rel. Duxbury* v. *Ortho Biotech Products, L.P.*, 579 F.3d 13 (1st Cir. 2009), involved a previously-filed suit that had been dismissed by the time the court of appeals issued its opinion applying the first-to-file bar, the court in *Duxbury* did not address whether the first-to-file bar applies when the related case is no longer pending. *Id.* at 33-34.

part, taking the view that, when "the first action is no longer 'pending,' the first-to-file bar should pose no continuing obstacle to the filing of a subsequent action." 2014 WL 1394687, at *6. The relator in *Shea* has filed a petition for rehearing en banc, and the United States has submitted an amicus brief supporting that petition. See 12-7133 Docket entries (D.C. Cir. May 9, 2014, and May 15, 2014).

If the D.C. Circuit grants en banc review in *Shea* and ultimately agrees with the government as to the proper construction of Section 3730(b)(5), there will no longer be any circuit conflict on the second question presented here. Because the disagreement in the circuits is a narrow one that soon may resolve itself without this Court's intervention, review of the second question presented is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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RECORD AND BRIEFS

No. 12-1497

IN THE

Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICES EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS AND BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CLEARING HOUSE ASSOCIATION L.L.C., AND THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, the Chamber of Commerce of the United States of America ("Chamber"), The Clearing House Association L.L.C. ("The Clearing House"), and the Pharmaceutical Research and Manufacturers of America ("PhRMA") move for leave to file the attached amicus curiae brief in support of petitioners. Petitioners have consented to the filing of the brief.

Respondent, however, has withheld consent, necessitating this motion.

The brief is appropriate and will assist the Court in its consideration of this important case. Amici have a direct interest in this case, as many of their members are potentially subject to the False Claims Act ("FCA") and other fraud-related actions that may be affected by the Fourth Circuit's interpretation of the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("WSLA"), and the FCA's "first-to-file" bar, 31 U.S.C. § 3730(b)(5).

Amici seek to apprise the Court of the negative consequences to the Nation's businesses if that decision is allowed to stand. The Fourth Circuit held that the WSLA (1) applies to both civil and criminal claims, even though it is codified in Title 18 and expressly covers only "offenses"; (2) applies when the United States is engaged in "armed hostilities," regardless whether they were commenced pursuant to a formal declaration of war, Pet. App. 11a-12a; (3) applies to claims by private parties, and not just by the Government; and (4) tolls the running of the limitations period under all statutes involving fraud against the Government until after—if ever—the President issues a proclamation or Congress passes a concurrent resolution terminating hostilities. As explained more fully in amici's brief, these holdings threaten to increase significantly the number of stale and ultimately meritless claims that may be pursued against businesses in a vast array of industries, including health care, government procurement, and banking and finance, particularly because the Fourth Circuit's rationale would allow the WSLA to toll the limitations and repose periods for alleged FCA

violations having nothing to do with wartime contracts.

In addition, the Fourth Circuit incorrectly ruled that the FCA's first-to-file rule is merely a temporary restraint on related suits, lasting only until the prior suit is dismissed or reduced to a judgment, and is thus no longer "pending." The statute was intended to create a race to the courthouse by whistleblowers who have valuable information about fraud and to bar repetitive or copycat suits that waste resources but provide the Government with no new material information. Under the Fourth Circuit's ruling, however, relators can serially file duplicative suits in the hope of financial gain. When coupled with the Fourth Circuit's interpretation of the WSLA, relators no longer have any meaningful time limits for filing FCA claims and are no longer barred from filing serial, duplicative claims. As explained in the brief, the sum effect of these rulings will be to increase the number of aged and duplicative cases that serve only to inflict substantial litigation costs on businesses—and, ultimately, the public—and clog the federal court system.

The Court has routinely granted the Chamber,[1] The Clearing House,[2] and PhRMA[3] leave to partici-

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[1] *See, e.g.*, *Oxford Health Plans LLC* v. *Sutter*, No. 12-135 (Dec. 7, 2012); *Genesis Healthcare Corp.* v. *Symczyk*, No. 11-1059 (June 25 2012); *Allison Engine Co.* v. *United States ex rel. Sanders*, No. 07-214 (Oct. 27, 2007); *Texaco Inc.* v. *Dagher*, Nos. 04-805, 04-814 (June 27, 2005); *BASF Corp.* v. *Peterson*, No. 04-81 (May 2, 2005); *Am. Trucking Assocs., Inc.* v. *Michigan Public Serv. Comm'n*, Nos. 03-1230, 03-1234 (Jan. 14, 2005).

pate as amici curiae in FCA and other cases. Leave to file should likewise be granted here.

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[2] *See, e.g., Cummings* v. *Doughty*, No. 12-351 (Nov. 26, 2012); *RadLAX Gateway Hotel. LLC* v. *Amalgamated Bank*, No. 11-166 (Mar. 9, 2012); *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012).

[3] *See, e.g., Warner-Lambert Co.* v. *Wakefield*, No. 04-1047 (May 16, 2005); *Andrx Pharmaceuticals, Inc.* v. *Kroger Co.*, No. 03-779 (Oct. 12, 2004).

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus curiae briefs in cases raising issues of vital concern to the Nation's business community, including cases involving the False Claims Act ("FCA").

Established in 1853, The Clearing House Association L.L.C., is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Association is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs, and white papers—the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States.

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intended to fund the preparation or submission of this brief. No person other than the amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. Because only petitioners have consented to the filing of this brief, a motion for leave to file accompanies this brief. The parties were timely notified of the intent to file this brief more than ten days in advance of the due date.

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2012 alone, PhRMA members invested an estimated $48.5 billion in efforts to research and develop new medicines. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal issues that impact the pharmaceutical industry and frequently participates as amicus in this Court.

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences for the Nation's businesses if the decision below is allowed to stand. The Fourth Circuit's opinion combined two far-reaching conclusions that would greatly expand the reach of the FCA. First, its interpretation of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, has the potential to indefinitely toll all statutes of limitations for all claims involving alleged fraud against the United States, whether civil or criminal and whether or not those claims are related to any war activities. Second, the Fourth Circuit's interpretation of the so-called "first-to-file" provision of the FCA, 31 U.S.C. § 3730(b)(5), would allow relators to file serial, duplicative actions so long as they are not active at the same time.

As amici argue below, unless the Court intervenes, the combined effect of these rulings will be to invite private plaintiffs and the Government to pursue indefinitely and repeatedly any claim involving

alleged fraud against the Government. The elimination of any repose would impose significant burdens on businesses, which will be forced to defend against stale, repetitive, and frequently meritless claims.

SUMMARY OF THE ARGUMENT

In one sweeping ruling, the Fourth Circuit has allowed private relators to revive stale civil claims against a broad range of business entities and to bring repetitive claims one after another. The court's interpretation of the WSLA authorizes potentially *indefinite* tolling of a vast number of civil claims against a wide range of defendants. That ruling is contrary to the language and purposes of both the WSLA and the FCA, and to precedents of this Court. Moreover, the court's interpretation of the "first-to-file" bar authorizes relators to file the same claims over and over so long as they are not pending at the same time.

By enabling private relators to pursue multiple claims without any meaningful time limitations, the decision below introduces significant unpredictability and uncertainty for U.S. businesses, and requires them to incur substantial costs to defend against otherwise time-barred claims. The ruling, moreover, is not limited to the context of defense procurement. It will affect other industries that are frequent targets of plaintiffs bringing FCA and other fraud-related claims, such as the banking and financial services, pharmaceutical, and health care industries. The Fourth Circuit's decision also facilitates more qui tam actions by unaccountable private relators. The Government intervenes in only a small number of FCA cases, and only a few of those uncover genuine fraud. In the vast majority of cases in which

the government declines to participate, private relators pursue claims that ultimately prove meritless. The ruling below further exacerbates this problem, by suspending limitations periods potentially forever and thereby allowing relators to file otherwise time-barred actions and subject businesses to continued uncertainty and the increased costs of defending against old claims.

The Fourth Circuit's misinterpretation of the FCA's "first-to-file" bar further aggravates these problems. Rather than creating a "race to the courthouse" that induces whistleblowers to come forward quickly with strong evidence of fraud, the Fourth Circuit's interpretation permits another duplicative suit to be filed as soon as the prior suit is no longer pending. This encourages serial relators who bring forward no new information to try their luck with a me-too suit, and virtually ensures that businesses will face not just the initial investigation that follows the first suit, but also years of costly litigation of equally meritless, follow-on claims after the first suit is dismissed.

REASONS FOR GRANTING CERTIORARI

I. ALLOWING POTENTIALLY LIMITLESS TOLLING FOR A VAST ARRAY OF CIVIL CLAIMS WOULD SIGNIFICANTLY HARM U.S. BUSINESSES

The WSLA is a criminal code provision, enacted during World War II, that, *inter alia*, tolls the statute of limitations for "any offense" involving fraud against the federal government "[w]hen the United States is at war." 18 U.S.C. § 3287. Since the statute was enacted, no circuit court had applied the WSLA to a civil FCA action, much less one brought by a private party. Pet. App. 35a (Agee, J.,

dissenting). Under the Fourth Circuit's ruling, however, the WSLA (1) applies to both civil and criminal claims, even though it is codified in Title 18 and expressly covers only "offenses"; (2) applies when the United States is engaged in "armed hostilities," regardless whether the hostilities were commenced pursuant to a formal declaration of war, Pet. App. 11a-12a; (3) applies to claims by private parties; and (4) tolls the running of the limitations period under all statutes involving fraud against the Government until after—if ever—the President issues a proclamation or Congress passes a concurrent resolution terminating hostilities. If allowed to stand, this decision will empower the Department of Justice—and encourage private relators—to seek to revive decades-old stale civil claims that are otherwise barred by the FCA's statute of limitations, thereby imposing significant unwarranted costs on the Nation's businesses.

A. The Fourth Circuit's Erroneous Decision Permits Virtually Unlimited Tolling For All Civil FCA Claims.

The breadth of the Fourth Circuit's holding is striking. Although the court applied the WSLA in this case because it considered the United States to have been "at war" in Iraq since October 2002, Pet. App. 12a, its interpretation of the WSLA extends far beyond the military context. And even though the WSLA covers only "offense[s]" involving fraud or attempted fraud against the United States, 18 U.S.C. § 3287(1), and is located among the criminal provisions of Title 18 of the U.S. Code, the Fourth Circuit held that it "applies to civil claims." Pet. App. 14a. The court's rationale would thus extend the reach of the WSLA to all civil FCA actions, whether

or not those claims are war-related, including actions regarding such disparate areas as health care, banking and financial services, procurement, energy, and grants, and whether or not those claims involve allegations of actual fraud.[2] Moreover, the broad language of the statute invites the plaintiffs' bar and the Government to argue that the holding covers claims brought under other statutes beyond the FCA.[3]

The decision also authorizes potentially indefinite tolling. The court of appeals held that the WSLA tolled the running of the statute of limitations due to the hostilities in Iraq—without attempting to tie that triggering event to any formal war declaration. Yet under the WSLA, the running of the limitations period is tolled "until 5 years after the termination of hostilities as proclaimed by a Presidential

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[2] Since its 1986 amendment, the civil FCA is no longer a true fraud statute requiring specific intent, and instead covers allegations of mere reckless disregard and deliberate ignorance. *See* 31 U.S.C. § 3729(b)(1) ("For purposes of this section—the terms 'knowing' and 'knowingly' * * * require no proof of specific intent to defraud."). The WSLA, however, should be "limited strictly to offenses in which defrauding or attempting to defraud the United States is an *essential ingredient of the offense charged.*" *Bridges* v. *United States*, 346 U.S. 209, 221 (1953) (emphasis in original); *see also United States* v. *Grainger*, 346 U.S. 235, 243 (1953) (holding that for the WSLA to apply, an offense must require as an "essential ingredient * * * the element of deceit that is the earmark of fraud" and indicating that the WSLA may not be thus applicable to the false statement provision of the criminal FCA).

[3] *See, e.g.*, 42 U.S.C. § 1320a-7a (health care fraud); 18 U.S.C. § 3287(2) (WSLA also applies to any "offense * * * committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States").

proclamation, with notice to Congress, or by a concurrent resolution of Congress," 18 U.S.C. § 3287(3), a formal declaration that has not yet happened and may never come.[4] Indeed, since the attacks of September 11, 2001 the United States has been continually engaged in numerous undeclared "armed hostilities," Pet. App. 12a, in Afghanistan, Iraq, and several other countries—none of which has been terminated through the formalities set forth in the WSLA. *See also* Barbara Salazar Torreon, Congressional Research Service, *Instances of Use of United States Armed Forces Abroad*, 1798-2013 (May 3, 2013) (www.fas.org/sgp/crs/natsec/R42738.pdf) (listing more than 330 U.S. foreign military operations in 215 years). Hence, the Fourth Circuit's interpretation of the WSLA would result in potentially limitless tolling of the limitations period for all qui tam cases whenever the United States has determined that, notwithstanding a state of armed conflict, it is not so significant that it warrants a formal declaration of war or peace.

By tolling limitations in this way, the Fourth Circuit's decision creates "incentives contrary to the purposes of the FCA." Pet. App. 37a (Agee, dissenting) (citing *U.S. ex rel. Sanders* v. *N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008)). As Judge Agee noted, relators would "have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery." *Id.* at 37a-38a (Agee, J., dissenting). And "[c]ritically," suspending limita-

[4] The prior version required similar formalities to terminate tolling. *See* 18 U.S.C. § 3287 (2006). As noted in the petition (Pet. 17 n.4) it is unnecessary to decide which version applies to this case.

tions periods for private relators would "undermine the very purpose of the *qui tam* provisions of the FCA," namely, "'to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not.'" *Id.* at 38a (quoting *Sanders*, 546 F.3d at 295).

Such perverse outcomes are predictable given that private relators seeking windfall gains have different incentives than the criminal prosecutors to whom the WSLA was actually directed. If the statute is properly limited to criminal cases and requires formal declarations to be invoked, prosecutorial discretion may help prevent overreaching in bringing stale criminal charges. Yet the Fourth Circuit's ruling allows private relators to litigate, on the Government's behalf, otherwise time-barred civil cases that the Government itself has deemed unworthy of further pursuit.

Such an expansion of tolling is unsupported by the recognized purpose of the WSLA to provide a wartime, resource-drained Government with additional time to pursue criminal fraud-related offenses. Pet. 12-13. Furthermore, that tolling is unnecessary in the civil FCA context, because the Government can obtain for good cause repeated extensions to keep a case under seal while it attends to other matters. 31 U.S.C. § 3130(b)(3). But the tolling is a boon for civil relators, who are not charged with prosecuting a war effort, and therefore have no similar resource-based restraints.

As the petition explains, *see* Pet. 10-17, the Fourth Circuit's decision contradicts this Court's prior

holdings on the WSLA,[5] and tolls FCA limitations in a manner contrary to the Court's recent recognition that the FCA contains an "absolute provision for repose" after 10 years. *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013). By overriding that limitation, the Fourth Circuit has effectively abolished the congressionally imposed constraints on the FCA. *See United States* v. *Midwest Generation, LLC*, --- F.3d ---, 2013 WL 3379319, *2 (7th Cir. July 8, 2013) (Easterbrook, J.) ("*Gabelli* tells us not to read statutes in a way that would abolish effective time constraints on litigation."); *see also Rotella* v. *Wood*, 528 U.S. 549, 554 (2000) (rejecting a rule that would have "extended the limitations period to many decades, and so beyond any limit that Congress could have contemplated" and "would have thwarted the basic objective of repose underlying the very notion of a limitations period").

B. Unlimited Tolling Would Threaten U.S. Businesses With Stale And Meritless Claims.

The Fourth Circuit's sweeping WSLA holding is likely to harm American businesses subject to suit under the FCA and other fraud-related statutes. The decision enables private relators to pursue claims without any meaningful time limitations, thereby subjecting U.S. businesses to unpredictable liability for aged claims and requiring them to incur ever-increasing costs to defend against those claims.

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[5] *See Bridges*, 346 U.S. at 216 ("The legislative history of this exception [embodied in the WSLA] emphasizes the propriety of its *conservative interpretation*. It indicates a purpose to suspend the general statute of limitations only as to war frauds of a pecuniary nature or of a nature concerning property.") (emphasis added)

Even before this decision, civil FCA litigation was expanding dramatically. From the time respondent filed his first qui tam complaint in 2006 until 2012, over 300 qui tam actions a year have been filed. U.S. Dep't of Justice, *Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2012*, 1-2 (2012) (www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf). By 2012, the number had increased dramatically to 647 per year. *Id.* at 2. The Fourth Circuit's decision tolling the FCA's statute of limitations indefinitely will only increase those numbers.

Government defense contractors, a regular target of qui tam suits, stand to face even more claims as a result of the Fourth Circuit's decision. For example, FCA relators may attempt to use the WSLA not only to toll the running of the FCA's statute of limitations, but indirectly to evade the six-year limitation on contract disputes by presenting otherwise barred contract claims as FCA claims. *See* David M. Nadler & Joseph R. Berger, *Fourth Circuit Decision On WSLA Paves Way For FCA Forum Shopping And More Stale Claims*, 55 Government Contractor ¶ 168 at 3 (June 5, 2013).

But the reach of the Fourth Circuit's decision interpreting the WSLA is not restricted to war-related industries or defense contractors; it would equally apply to civil cases involving a wide array of industries.

For example, the health care industry has been a primary target of FCA suits. *See* James J. Belanger & Scott M. Bennett, *The Continued Expansion of the False Claims Act*, 4 J. Health & Life Sci. L. 26, 28 (2010). Recent FCA amendments have caused an "explosion" of qui tam suits against health care companies. *See* Beverly Cohen, *KABOOM! The*

Explosion of Qui Tam False Claims Under the Health Reform Law, 116 Penn. St. L. R. 77, 96 (2011). Of the 12,913 FCA cases brought between 1987 and 2012, 5,527, or nearly 43% have involved the health care industry. U.S. Dep't of Justice, *Fraud Statistics – Health and Human Services Oct. 1, 1987 – Sept. 30, 2012* at 2 (2012). In fiscal year 2012, 412 out of 647 new qui tam FCA matters involved the Department of Health and Human Services as the primary client agency. *Id.* The Fourth Circuit decision invites many more such actions as relators assert the WSLA as a basis to toll health care suits, as one recently did in a case against several medical providers. *See* Relator's Supp. Opp. to Mot. to Dismiss at 2, *United States ex. rel Tullio Emanuele* v. *Medicor Assocs.*, No. 10-245E (W.D. Pa. filed March 29, 2013).

The financial services industry has also begun to feel the effect of the Fourth Circuit's decision. In mid-2012, the Department of Justice similarly argued for suspension of limitations under the WSLA in its civil FCA claims against financial services companies involving commodity payment guarantees. *See United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 600-08 (S.D. Tex. 2012). Since the Fourth Circuit's decision, the Government has also asserted that the WSLA tolls the operation of the statute of limitations in a case alleging fraud of a domestic lending program. *See* Mem. of Law of the U.S. in Opp. to Wells Fargo Bank, N.A.'s Mot. to Dismiss at 46-48, *United States* v. *Wells Fargo Bank, N.A.*, No. 12-CV-7527 (S.D.N.Y. filed Oct. 9, 2012).

American businesses, like the government and the American public, have an interest in rooting out fraud. There is strong evidence, however, that the vast majority of qui tam relator suits are meritless,

serving only to inflict costs on businesses (and ultimately the public). Approximately 75% of FCA actions brought between 2006-2012 were qui tam relator actions, with such actions accounting for 82% of the total in 2012. *Fraud Statistics: Overview, supra,* at 1-2. Once its investigation is complete, the United States traditionally declines to participate in approximately 78% of these suits. Christina O. Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 971 (2007) (study of suits from 1987-2004). Tellingly, from 1987-2012, qui tam actions in which the government declined to intervene accounted for only 3.2% of total qui tam monetary settlements and judgments. *Fraud Statistics: Overview, supra,* at 1-2. For the health care industry, qui tam cases in which the Government declines to participate result in less than 2.1% of all recoveries. *Fraud Statistics: Health and Human Services, supra,* at 1-2. According to a comprehensive empirical analysis, 92% of cases in which the U.S. declined to intervene were dismissed. Broderick, *supra* at 975 (using data from 1987 to 2004).

Less than 10% of private qui tam actions actually result in recovery. *Id.* And of the remaining more than 90%, a large majority are dismissed as frivolous or otherwise without merit. *Id.*; *see also* Todd J. Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 9 (2007). Thus, the vast majority of qui tam cases declined by the government are meritless. Although the Department of Justice has the authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss any qui tam suit, it rarely does so, leaving a substantial majority of private qui tam relator cases

to proceed in litigation. *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2007-08) ("[T]he result is that the government does not dismiss, and relators are permitted to proceed with, thousands of non-meritorious qui tam suits.").

American businesses undergo significant hardship—both financial and reputational—as a result of these meritless qui tam FCA claims. Defending against an FCA claim is very costly and requires a "tremendous expenditure of time and energy." Canni, *supra*, at 11 n.66. As demonstrated by the present case, these meritless lawsuits can continue for years before dismissal. Further, the defendant may also be motivated to settle, despite the lack of merit, to avoid the potentially enormous expenditures of money and time needed to defend such a suit. *Id.* at 11-12.

Similarly, businesses suffer significant reputational harm from these meritless lawsuits. Since "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices," *id.* at 11, businesses that rely on government contracting unnecessarily have their reputations damaged. *Id.* at 10-11. Ultimately, the "costs of the litigation in the vast majority of [relator qui tam] cases, outweigh[s] any benefit to the public. [M]ost non-intervened suits exact a net cost," as business defendants must expend financial resources to defend against meritless claims and suffer unwarranted damage to their reputations. Rich, *supra*, at 1264; *see also* Canni, *supra*, at 2.

The Fourth Circuit's decision, if allowed to stand, will multiply all these harms. In the Fourth Circuit, home to numerous government contractors and financial institutions, operation of the WSLA has tolled the statute of limitations since at least October 2002 when Congress authorized the President to use military force in Iraq. Pet. App. 12a. Moreover, before 2002 the United States engaged in other similar undeclared "armed hostilities," *id.*, such as the armed conflict in Afghanistan that begin in 2001, *see* Pet. 16, or even the Persian Gulf War that began in 1991. These conflicts have yet to be formally terminated in the manner set forth in the WSLA, *see id.* at 16, 21, leading to the possibility that plaintiffs will seek to assert even older claims. Allowing businesses to be subjected to an uncertain range of claims that were long since understood to have been time-barred will only exacerbate the problems businesses face from meritless qui tam litigation.

Moreover, the unwarranted costs of defending against qui tam claims by private relators are even greater for stale claims. Statutes of limitations and repose "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). By allowing claims under the FCA to be tolled potentially *ad infinitum*, the Fourth Circuit's ruling eviscerates these benefits. Furthermore, businesses will never know when they may "close the books" on any particular matter. And they will incur significant costs in attempting to defend against decades-old claims. These are exactly

the kind of difficulties that the FCA's statutes of limitations and repose were enacted to avoid.

II. THE FIRST-TO-FILE BAR DOES NOT SUBJECT BUSINESS TO DUPLICATIVE, SERIALLY FILED FCA CLAIMS

The error of the Fourth Circuit's WSLA ruling is compounded by its erroneous interpretation of the FCA's first-to-file bar. Either decision by itself would warrant this Court's intervention; when taken together, the case for certiorari is manifest. Lifting the "first-to-file" bar when a case is no longer active would improperly encourage the filing of multiple, duplicative claims. And because the WSLA was held to toll limitations even for private FCA claims, relators may serially file duplicative claims indefinitely.

The first-to-file bar provides: "When a person brings [a qui tam FCA] action * * * no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). This bar is absolute—"no person other than the Government may * * * bring a related action"—and it takes effect immediately upon the filing of the first case.

Contrary to the decision below, the statute provides no end point for application of the first-to-file bar against related cases. The statutory words "pending action" impose no time limit, but rather are just a means of specifying the first-filed action. As one court rightly explained, the word "'pending' is used as a short-hand for the first-filed action, and 'pending' was used instead of some other term so that the courts would compare the first-filed action's most recent allegations with the second-filed action's complaint." *U.S. ex rel. Powell* v. *Am.*

Intercontinental Univ., Inc., No. 1:08-CV-2277-RWS, 2012 WL 2885356 at *4 (N.D. Ga. July 12, 2012). The bar on related cases takes effect as soon as the first action is pending, but nothing in the statute terminates that bar when that action is concluded. If Congress wanted to say that the bar applies only "while the earlier-filed action is pending," Congress would have said precisely that.

This is in accordance with the purpose underlying qui tam FCA actions. "[O]nce the Government has notice of potential fraud, the purposes of the FCA are vindicated" and "the policies behind the statute do not support successive suits simply because the first suits were dismissed." *Id.* at *5. "A whistleblower sounds the alarm; he does not echo it." *U.S. ex rel. Green* v. *Northrop Corp.*, 59 F.3d 953, 966 n.11 (9th Cir. 1995) (citation omitted). "Once the government is put on notice of its potential fraud claim"—which happens when the first action is filed—"the purpose behind allowing qui tam litigation is satisfied." *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). *See also U.S. ex. rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001) ("Dismissed or not, [the first-filed] action promptly alerted the government to the essential facts of a fraudulent scheme-thereby fulfilling a goal behind the first-to-file rule.").

The Fourth Circuit's interpretation of the first-to-file bar, however, frustrates this statutory design and "create[s] perverse incentives and 'reappearing' jurisdiction." *Powell*, 2012 WL 2885356 at *5. The statute intentionally facilitates a "race to the courthouse" because "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *U.S. ex. rel.*

Branch Consultants v. *Allstate Ins. Co.*, 560 F.3d 371, 377, 378 (5th Cir. 2001) (quotation omitted). If the first-to-file bar ends when the first action is dismissed, however,

> a race to the courthouse would not occur as subsequent relators would wait hoping that the first-filed action would be dismissed, and fraud would continue to occur in the interim. Moreover, a relator would be able to file, dismiss, and refile identical qui tam actions, thus encouraging forum shopping and wasting government resources that would be required to review the claims in each action.

Powell, 2012 WL 2885356 at *5.

Businesses, moreover, would be subjected to serial, duplicative claims without any corresponding public benefit. As noted above, private qui tam cases in which the government does not intervene comprise a large majority of FCA cases but account for only a miniscule percentage of total recoveries. *See supra* at 12-14. But these are the kind of cases most likely to be kept alive by the Fourth Circuit's ruling. The first-filed suit will have already put the government on notice of the potential fraud, giving it the opportunity to investigate and intervene. When the government does not intervene, the relator will often voluntarily dismiss that suit without a preclusive judgment. *See Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). Yet under the Fourth Circuit's ruling, future relators (including repeat relators) will be able to bring duplicative claims even though the Government—the real party in interest—has already been alerted to the alleged fraud and has declined to pursue it. *See* Pet. App. 22a. The result will be to inflict substantial costs on

businesses defending duplicative suits without any appreciable gains in ferreting out actual fraud.

The facts of this case illustrate well the problems entrenched by the Fourth Circuit's decision. Respondent Carter has already filed three complaints containing the same allegations, which were also the subject of three other prior qui tam actions. Pet. 6-7. Each time, the Government has declined to intervene. *Id.* And yet, the court below has now held that neither limitations nor the first-to-file provision bars him from filing a fourth case with the same allegations, more than eight years after the underlying events. Pet. App. 22a. The first-to-file rule was intended to prevent such burdensome litigation once the government is already alerted to an alleged fraud. The court's ruling, by contrast, affirmatively fosters it.

III. THE COURT SHOULD NOT DELAY RULING ON THESE IMPORTANT ISSUES.

The Court has decided several FCA cases in recent years. *See, e.g.*, *Schindler Elevator* v. *U.S. ex rel. Kirk*, 131 S. Ct. 1885 (2011) (FCA's public disclosure bar); *Graham Cty. Soil* v. *U.S. ex rel. Wilson*, 559 U.S. 280 (2010) (public disclosure bar); *U.S. ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928 (2009) (time for filing appeal when U.S. declines to intervene in FCA action); *Allison Engine Co.* v. *U.S. ex rel. Sanders*, 553 U.S. 662 (2008) (plaintiff's burden under 31 U.S.C. §§ 3729(a)(2) and (a)(3)). This case is as important, if not more important, than those cases because the Fourth Circuit's decision threatens to increase significantly the number of FCA claims that relators and the Government may pursue.

The Court has also recognized the importance of statutory limitations periods in civil enforcement cases similar to FCA cases. In *Gabelli*, the Court noted the "importance of time limits on penalty actions," and refused to graft a discovery rule on to a general statute of limitations when doing so would expose defendants to SEC enforcement actions for "an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223. *See also Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 354 (1991) (describing proper limitations period for Rule 10b-5 claims as an "important issue"); *Baldwin Cty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (Stevens, J., dissenting) (dissent from summary disposition in EEOC case on grounds that "possible violations of two time limitations imposed by Congress" was "an important issue [that] may escape our attention").

Nor should the costs of the ruling below be dismissed as merely the ruling of a single circuit, for the Fourth Circuit is a particularly important venue for FCA litigation Now that the Fourth Circuit has held that both the Government and private relators can obtain limitless tolling under the FCA in civil cases and can file multiple actions on the same claims, new cases will flood to district courts within that Circuit. Even before this ruling the Fourth Circuit was host to two of the most popular venues for FCA claims because many government agencies and contractors reside or do business there. *See* Pet. 23. The FCA's liberal venue provisions also permit many relators to file (or refile) their cases in a district court in the Fourth Circuit in order to take advantage of the ruling. *See* 31 U.S.C. § 3732(a) (case "may be brought in any judicial district in

which the defendant * * * can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred"). Once these cases are filed (or refiled), it can take years to clear them out, and only at great cost to the businesses who must repeatedly defend against these claims. The Court should grant the petition now to correct the errors of the court below before they cause further harm to the Nation's businesses.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should issue a writ of certiorari and reverse the judgment below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

JUL 26 2013

RECORD AND BRIEFS

No. 12-1497

IN THE

Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), *Amicus* National Defense Industrial Association ("NDIA") respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of Petitioners. This motion is necessary because Respondent has withheld consent to the filing of the NDIA's brief. Petitioners have consented to the filing of the brief.

The NDIA is a non-partisan, non-profit organization whose membership consists of 90,000 individuals and 1,780 companies, including some of the nation's largest defense contractors. The NDIA has filed numerous briefs as an *amicus* in this Court.

Because a substantial percentage of all False Claims Act ("FCA") lawsuits target defense contractors, the NDIA seeks to ensure that the scope of FCA liability does not expand beyond Congress' intentions. Accordingly, the NDIA has a significant interest in the Fourth Circuit's decision in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013). The decision dramatically extends – and potentially eliminates – the six-year statute of limitations period for relators in FCA suits, and guts the FCA's "first-to-file" requirement. The decision thus permits untimely, repetitive, and harassing lawsuits, and bestows upon relators unwarranted leverage in extracting settlements from the NDIA's members. At bottom, the Fourth Circuit's decision will encourage relators to file redundant and frivolous claims and discourage relators from bringing meritorious claims promptly.

Because the NDIA is uniquely positioned to comment on the importance of the decision below to the defense industry, it offers a useful perspective on the issues before this Court. The NDIA thus respectfully requests that the Court grant this motion for leave to file the attached brief *amicus curiae* in support of Petitioners.

July 26, 2013

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The National Defense Industrial Association ("NDIA") is a non-partisan, non-profit organization whose membership consists of 90,000 individuals and 1,780 companies, including some of the nation's largest defense contractors.[1] Because a substantial percentage of all False Claims Act ("FCA") lawsuits target defense contractors, the NDIA seeks to ensure that the scope of FCA liability does not expand beyond Congress' intentions.

Accordingly, the NDIA has a significant interest in the Fourth Circuit's decision in *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013). The decision dramatically extends – and potentially eliminates – the six-year statute of limitations period for relators in FCA suits, and guts the FCA's "first-to-file" requirement. The decision thus permits untimely, repetitive, and harassing lawsuits, and bestows upon relators unwarranted leverage in extracting settlements from the NDIA's members. At bottom, the Fourth Circuit's decision will encourage relators to file redundant and frivolous claims and discourage relators from bringing meritorious claims promptly.

Although the decision applies only within the

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[1]No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties received timely notice of *amicus*' intent to file this brief. Although Petitioners have consented to the filing of this brief, Respondent has not so consented, and a motion for leave to file pursuant to Rule 37.2(b) accompanies this brief.

Fourth Circuit, there is a large defense industry presence in that area, and the FCA's permissive venue rules permit nearly every relator to bring a claim in a Fourth Circuit district court. Moreover, the Fourth Circuit's decision already has been cited by relators in other circuits who are seeking to revive their untimely FCA claims. For these reasons, *amicus* has a critical interest in obtaining prompt review of the decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus NDIA submits this brief in support of Petitioners urging the grant of the writ of certiorari to the Fourth Circuit's decision applying the Wartime Suspension of Limitations Act ("WSLA") to civil claims, including *qui tam* suits arising out of the FCA.

The decision below warrants review because it is of enormous consequence to the defense contracting community and because it is clearly erroneous. As Petitioners establish, the Fourth Circuit's decision essentially eliminates the statute of limitations for FCA claims by holding that the WSLA tolls such claims until Congress or the President formally terminates all declared wars. The decision also transforms the FCA's "first-to-file" requirement into a "one-suit-at-a-time" rule by permitting relators to bring claims based entirely on allegations from cases that were previously dismissed.

The consequences of the Fourth Circuit's decision for contractors, the government, and, ultimately,

taxpayers, are obvious and dramatic. Freed from the statute of limitations, relators with meritorious FCA claims will delay filing those claims in order to pursue larger damages awards, thereby undermining the government's ability to promptly identify and address instances of fraud. Meanwhile, relators *without* meritorious claims – already the vast majority – will not be barred from bringing their claims repeatedly, or in an untimely fashion, and will be able to seek damages stretching back for years. The result will be increased costs for the government (in the form of more undetected fraud) and increased settlement and litigation costs for contractors, all of which ultimately will be borne by taxpayers.

This Court should not wait to address this issue. Although the decision applies only within the Fourth Circuit, that is not a meaningful limitation on its scope. Most defense contractors are located within the Fourth Circuit, and the venue rules of the FCA will make it easy for relators to take advantage of the Fourth Circuit's decision.

The Fourth Circuit's decision is as incorrect as it is momentous. The NDIA fully agrees with Petitioners' arguments as to why the lower court misinterpreted both the WSLA and the FCA, but writes separately to emphasize the breadth of the court's errors in reading the WSLA to apply to civil fraud claims. That interpretation defies the text, structure, and history of the statute. It cannot be squared with the WSLA's reference to any "offense" against the United States – a term that refers only to criminal claims. It disregards Congress' placement

of the WSLA in Title 18 of the United States Code, which is dedicated to criminal statutes. And it ignores Congress' own pronouncements in 1942, 1946, and 2008 that the WSLA covers criminal claims alone. In the face of such overwhelming evidence of Congress' intent, the Fourth Circuit's expansion of the WSLA to cover civil claims based solely on an ambiguous 1944 amendment was clearly erroneous.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS OF VITAL IMPORTANCE TO THE DEFENSE INDUSTRY.

The Fourth Circuit dramatically expanded the reach of the WSLA by holding that it tolls the statute of limitations for any *civil* claim of defrauding the government for as long as the United States is considered at war. The court also gutted the FCA's "first-to-file" requirement by permitting FCA claims to be re-filed even after a similar (or identical) claim had been dismissed or had proceeded to judgment. Both independently and together, these holdings have enormous practical implications for the defense industry.

FCA litigation is already characterized by a very high percentage of relator suits in which the government declines to intervene, and a correspondingly low percentage of suits that are proven to be meritorious. *See* Dep't of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf (last visited July 18, 2013) ("Fewer than

25% of filed qui tam actions result in an intervention") ("*False Claims Act Cases*"); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 Colum. L. Rev. 1244, 1251 n.22 (2012) ("90% of intervened cases achieve imposition, while 90% of declined cases do not.").

These unmeritorious suits are a drain on defense contractors and taxpayers, and the decision below will exacerbate that problem in at least three ways. *First*, the decision below encourages savvy relators to wait as long as possible to bring their claims in order to maximize the potential damages award. That outcome not only undermines the FCA's primary purpose of "combat[ting] fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not," *United States ex rel. Sanders v. North American Business Industries, Inc.*, 546 F.3d 288, 295 (4th Cir. 2008), but also produces considerable uncertainty for the defense industry. The indefinite tolling makes it more likely that relevant documents will have been lost, and that potential witnesses will have died, left the company, or otherwise become unavailable. All the while, relators – who know that they intend to bring a FCA claim, while contractors obviously do not – can retain the key documents to support their cases and time the filing of their complaints to maximize the strength of their claims. Contractors' additional costs of defending against untimely and meritless FCA claims ultimately will be borne by taxpayers.

Second, and relatedly, the Fourth Circuit's

decision will improperly increase relators' leverage in settlement negotiations by permitting them to file claims seeking substantially greater damages, thereby creating a strong incentive for defense contractors to settle even unmeritorious claims.

Consider a hypothetical relator's fraud claim on a contract running from 2001-2013, with ten million dollars in annual payments. Before the Fourth Circuit's decision, the relator's total claim would be limited to six years of payments under the FCA's statute of limitations, *see* 31 U.S.C. § 3731(b)(1), resulting in a total claim of sixty million dollars. But with the indefinite extension of the statute of limitations under the Fourth Circuit's interpretation of the WSLA, the relator can seek damages reaching back twelve years to the beginning of the contract, resulting in a total claim of 120 million dollars. Even if a contractor believes that claim to be unmeritorious, the greater potential exposure may cause it to settle to avoid the risk of that significant loss. And as relators start seeing the defense industry settling even questionable claims, it will create only a greater incentive for relators to bring stale claims that assert enormous damages. The Fourth Circuit's decision ultimately will put the defense industry in an untenable position, and will drive up the cost of contracting for the government without any concurrent reduction in fraudulent conduct.

Third, the Fourth Circuit's gutting of the FCA's "first-to-file" requirement will likely lead to a sharp increase in the number of redundant and harassing

suits. With no first-to-file bar or statute of limitations, relators will continue to file the same complaint over multiple years. The current case is a prime example of that phenomenon. The respondent, Benjamin Carter, who worked for a government contractor in Iraq in 2005, filed three identical claims in 2006, 2008, and 2011. Pet. App. 49a-53a. Although the government repeatedly refused to intervene and similar cases were pending when Mr. Carter filed the initial claim in 2006, the defense contractor nevertheless had to defend the same claim three separate times. Under the lower court's decision, relators like Mr. Carter could repeatedly file decade-old claims with little merit.

Again, even if such claims are patently frivolous, it is expensive for contractors (and time-consuming for courts) to address them. Contractors may opt to settle with relators even if their claims are baseless simply to put an end to their repetitive lawsuits. That is not the outcome Congress envisioned for the FCA, and it will only further clog the already congested dockets of the federal courts.

This Court should not delay in addressing this issue. While the decision below applies only in the Fourth Circuit, that is not a meaningful constraint on its reach. Not only is the defense industry highly concentrated in the Circuit, but because the FCA allows relators to bring claims "in any judicial district in which the defendant can be found, resides, [or] transacts business," 31 U.S.C. § 3732(a), relators likely will flock to the courts of the Fourth Circuit to attempt to revive claims that would be

dismissed as barred or untimely elsewhere.

In sum, the decision threatens dire effects on the defense industry with little corresponding benefit for the government. It will subject contractors to massive damage claims reaching back for years, ratcheting up the pressure on contractors to settle even unmeritorious claims and allowing relators to strategically delay informing the government of their allegations of fraud. It will substantially increase uncertainty, as contractors could face FCA claims based on conduct many years in the past. And it will encourage redundant and harassing litigation, thereby wasting the resources of both the defense industry and the courts.

The lower court's ruling is not a minor reworking of the FCA; it fundamentally alters the balance Congress struck between the interests of purported whistleblowers and government contractors. The defense industry – and the country – will suffer as a result.

II. THE DECISION BELOW IS INCORRECT.

Petitioners contend that the Fourth Circuit misinterpreted both the FCA and the WSLA in numerous respects. The NDIA agrees.

As Petitioners have explained, the lower court's interpretation of the FCA's "first-to-file" requirement is incompatible with the text and purpose of 31 U.S.C. § 3730(b)(5). The Fourth Circuit's reading misconstrues the word "pending" in Section 3730(b)(5) and undermines the unquestioned purpose of the statutory provision – to prevent

relators from bringing multiple suits based on factual allegations of which the government is already aware. *See* Pet. 29-30.

The NDIA also writes separately to highlight one of the Fourth Circuit's basic errors in statutory construction: its ruling that the WSLA applies not just to criminal claims, but to civil claims as well. That conclusion is fundamentally inconsistent with the text, structure, and legislative history of the WSLA, and defies this Court's admonishment that the WSLA should be "narrowly construed." *Bridges v. United States*, 346 U.S. 209, 215-16 (1953).

Statutory construction begins with the text of the statute, *see Carter v. United States*, 530 U.S. 255, 271 (2000), and here, the text is clear. The WSLA applies to "any *offense* involving fraud or attempted fraud against the United States." 18 U.S.C. § 3287 (emphasis added). Because the "terms crime, offense, and criminal offense are all said to be synonymous, and ordinarily used interchangeably," Black's Law Dictionary 1186 (9th ed. 2009) (internal quotation marks omitted), the text of the WSLA plainly limits its application to claims of criminal fraud. And because "the statute's language is plain," the Court must "enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

The placement of the WSLA within the United States Code corroborates its plain meaning. The statute is part of Title 18, which "codifies the federal criminal laws." *Pennsylvania v. Nelson*, 350 U.S. 497, 519 (1956). That is compelling evidence that Congress intended to limit the application of the

WSLA to criminal fraud claims alone. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (finding that placement of a state law within the probate code, instead of the criminal code, supported interpretation that the law was meant to create a civil proceeding rather than a criminal proceeding).

Given the inconsistency between its interpretation and the plain meaning of the WSLA, it is no surprise that the Fourth Circuit hardly analyzed the statutory text or structure at all. Instead, the court relied almost exclusively on a minor 1944 amendment to the WSLA, which deleted the qualifier "now indictable under existing statutes" from the statutory reference to "offenses." In the Fourth Circuit's telling, that single deletion changed the WSLA from a statute that only applied to criminal fraud claims to one that applied "to all actions involving fraud against the United States." Pet. App. 14a.

The circuit court read far too much into the 1944 amendment. The fundamental purpose of the WSLA was to extend the statute of limitations for criminal claims. The Senate report accompanying the 1942 bill that enacted the WSLA specifically referenced the "*criminal* statute of limitations," and noted that the bill would give the government more time to "*prosecute* frauds." S. Rep. No. 77-1544, at 1-2 (1942) (emphases added). The statute accordingly imposed a three-year limitations period to bring claims following the termination of a war; a period that matched the standard, three-year statute of limitations for criminal fraud offenses at that time.

Id. Congress' purpose was not lost on this Court, which noted that Congress passed the WSLA out of concern that "law-enforcement officers would be so preoccupied with prosecution of the war effort that the *crimes of fraud* perpetrated against the United States would be forgotten until it was too late." *United States v. Smith*, 342 U.S. 225, 228-29 (1952) (emphasis added).

Against that backdrop, it is implausible that, just two years after enacting the WSLA, Congress would have dramatically expanded the statute to cover civil claims simply by deleting the phrase "now indictable under any existing statutes." The Fourth Circuit's contrary claim ignores the basic principle that Congress does not fundamentally alter a statutory provision in "so cryptic a fashion," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); that Congress, in other words, does not "hide elephants in mouseholes," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress had wished to apply the WSLA to all civil fraud claims against the government, it surely would not have been so coy. There are any number of ways Congress could have covered civil claims less obliquely.[2]

---

[2] The Fourth Circuit's reading of the 1944 amendment to cover civil FCA claims also cannot be squared with Congress' attempt to rein in FCA claims in the early 1940's. In 1943, this Court held that the FCA allowed a private relator to bring suit even if the suit was based entirely on a previous investigation by the government. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-48 (1943). Both the Attorney General and Congress balked at the Court's ruling. Their dissatisfaction

Moreover, the Fourth Circuit's reasoning overlooks much more compelling alternative explanations for the 1944 amendments. The 1942 act that introduced the WSLA was a temporary measure that only applied the statutory tolling period to World War II. *See* S. Rep. No. 77-1544, at 1 (1942) (updating expiration date of World War I version of WSLA to "June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate"). Congress enacted the 1944 amendment in part to eliminate the need to renew the act in future declared wars. *See* Act of July 1, 1944, ch. 358, 58 Stat. 649, 667. In that context, Congress likely eliminated the phrase "now indictable under any existing statutes" because it wished to make the WSLA permanent, and the term "existing statutes" was only needed if the statute's applicability was expressly time-limited. In addition, given that the deleted phrase is redundant with the term "offense," Congress may well have viewed it as surplusage and removed it in an effort to streamline the statute.

Whatever Congress' exact rationale for the 1944 amendment may have been, post-1944 developments

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ultimately led to a 1943 law that curtailed relators by prohibiting *qui tam* suits based on information gleaned from a government investigation. *See* Francis Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 Cath. U.L. Rev. 935, 941-42 (1993). It defies logic for Congress to have expanded (or even eliminated) the limitations period for relators just months after sharply restricting relators' ability to bring FCA claims.

demonstrate that the Fourth Circuit's speculative explanation is incorrect. In 1948, four years after the 1944 amendment that purportedly expanded the WSLA to civil claims, Congress placed the WSLA into Title 18 of the United States Code, which was dedicated then (as now) to criminal statutes. *See* Act of June 25, 1948, ch. 645, 62 Stat. 683. And that same year, Judge Learned Hand reaffirmed that the purpose of the WSLA – "as amended in 1944" – was to not "let *crimes* pass unpunished which had been committed in the hurly-burly of war." *United States v. Gottfried*, 165 F.2d 360, 367-68 (2d Cir. 1948) (emphasis added).

Indeed, some fifty years later, Congress still regarded the WSLA as pertaining solely to criminal offenses. In passing the 2008 amendment to the WSLA, Congress noted that the statute "protect[ed] American Taxpayers from *criminal* contractor fraud." S. Rep. No. 110-431, at 1-2 (2008) (emphasis added). The 2008 amendment modified the WSLA's trigger to cover not only declared wars, but also congressionally authorized conflicts, so that the statute would permit the government to bring "*criminal* actions in investigations of contracting fraud" in the early years of the Afghanistan and Iraq wars. *Id.* at 4 (emphasis added). And the 2008 amendment increased from three to five years the WSLA's limitations period for bringing claims following the termination of a war, reflecting the increase from three to five years in the standard statute of limitations for criminal fraud provisions. *Id.* at 5.

Interpreting the WSLA to apply to civil claims also makes little sense given Congress' underlying rationale for the statute. Congress sought to toll the statute of limitations for criminal fraud claims during times of war because uncovering and prosecuting those claims while simultaneously expanding procurement programs placed great demands on the government. *See Bridges*, 346 U.S. at 218-19 (the WSLA "sought to help safeguard the treasury from such frauds by increasing the time allowed for their discovery and prosecution"). Civil fraud claims do not present the same concerns. In the vast majority of FCA cases, the government does not even intervene. *See False Claims Act Cases* ("Fewer than 25% of filed qui tam actions result in an intervention"). Indeed, this case illustrates the point precisely: the government elected not to intervene, so there is no need for concern about over-taxing the government's prosecutorial resources. And in those instances when the government does intervene, its burden of proof in a civil FCA case is far less onerous – and thus its need to commit investigatory and litigation resources is much lower – than it would be in a criminal case. The Fourth Circuit's expansion of the WSLA to civil claims thus is unrelated to the statute's animating purpose.

Moreover, the Fourth Circuit's expansion of the statute fails to take into account the very real differences between the situation during World War II, when the statute was enacted, and today. World War II of course was an all-encompassing struggle that demanded the full resources and attention of all branches of government, including law enforcement.

In that context, it made sense to allow the government to wait until after the conflict to bring claims, particularly criminal fraud claims that required substantial commitments of time and resources to prosecute. Under the Fourth Circuit's new view of the statute, however, the FCA's statute of limitations will be tolled for civil as well as criminal claims for the potentially open-ended period of combat operations during the nation's war on terror. This is so even though private relators – and the government itself – have demonstrated their ability to file a multitude of FCA claims while those operations are ongoing. In this context, the Fourth Circuit's decision to effectively eliminate the FCA's statute of limitations goes far astray from the WSLA's original purpose and context.

In sum, in 1942, 1948, and 2008, Congress both explicitly and implicitly restricted the scope of the WSLA to criminal fraud claims. It never once expressed any desire to expand the WSLA to civil fraud claims, and never hinted that the WSLA had such a broad reach. Moreover, it would not advance Congress' purpose in enacting the WSLA to expand the statute's coverage to civil claims. Nevertheless, the Fourth Circuit found that the deletion of an ambiguous statutory phrase in 1944 effected a massive expansion of the scope of the WSLA such that all civil fraud claims involving the government – including those brought exclusively by private parties – were tolled for years, or potentially, indefinitely. That reading of the WSLA defies all basic principles of statutory interpretation.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant certiorari to review the decision below.

July 26, 2013

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
AUG 29 2014
OFFICE OF THE CLERK

No. 12-1497

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL, PETITIONERS,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX
(VOLUME 1)

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PETITION FOR CERTIORARI FILED JUNE 24, 2013
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

UNITED STATES EX REL. BENJAMIN CARTER,	)	
Plaintiff,	)	
v.	)	Case 1:11-cv-602 (JCC/JFA)
HALLIBURTON CO., ET AL.,	)	
Defendants.	)	

RELEVANT DOCKET ENTRIES

No.	Filed	Docket Text
1	06/02/11	COMPLAINT against Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees Interna-

No.	Filed	Docket Text
		tional, Inc. (Filing fee $ 350.00 receipt number 14683021954), filed by Benjamin Carter.(stas) (Additional attachment(s) added on 8/26/2011: # 1 Civil Cover Sheet, # 2 Receipt) (nhall,). Text Modified on 4/11/2012 To Remove UNDER SEAL verbiage (nhall). (Entered: 06/02/2011)
3	08/23/11	The United States' Notice Of Election To Decline Intervention by United States of America. (Attachments: # 1 Proposed Order)(nhall) Docket Entry Modified on 4/11/2012 Per Order Of 8/24/11(nhall). (Entered: 08/24/2011)
4	08/24/11	ORDER. IT IS ORDERED that, 1. the complaint be unsealed and served upon the defendant by the relator; 2. all other contents of the Court's file in this action remain under seal and not be made public or served upon the defendant, except for this Order and The United States' Notice of Election to Decline Intervention, which the relator will serve up the defendant only after service of the complaint; 3. the seal be lifted

No.	Filed	Docket Text
		as to all other matters occurring in this action after the date of this Order. (See Order For Details). Signed by District Judge James C. Cacheris on 8/24/11. (nhall) Docket Entry Modified on 4/11/2012 Per Order Of 8/24/11(nhall). (Entered: 08/24/2011)
11	10/21/11	MOTION to Dismiss *Relator's Complaint* by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Proposed Order)(Faust, John) (Entered: 10/21/2011)
16	10/21/11	Sealed Document-Memorandum In Support Of Defendants' Motion To Dismiss Relator's Complaint re 11 MOTION to Dismiss Relator's Complaint. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8)(nhall) (Entered: 10/27/2011)
21	11/03/11	UNDER SEAL Opposition to 11 MOTION to Dismiss Relator's Complaintfiled by Benjamin

No.	Filed	Docket Text
		Carter [Document is Spiral Bound and has been placed in the Civil Vault]. (stas) (Entered: 11/03/2011)
27	11/08/11	Sealed Document-Reply Memorandum In Support Of Defendants' Motion To Dismiss Relator's Complaint re 11 MOTION to Dismiss Relator's Complaint. (Attachments: # 1 Exhibit 9, # 2 Exhibit 10)(nhall) (Entered: 11/09/2011)
29	11/11/11	MOTION for Leave to File Sur-Reply by Benjamin Carter. (Holmes, William) (Entered: 11/11/2011)
35	11/16/11	Sealed Document Defendants' Response To Relator's 29 MOTION for Leave to File Sur-Reply. (Attachments: # 1 Exhibit 11)(nhall) (Entered: 11/17/2011)
38	11/18/11	Sealed Document-Relator's Reply In Support Of His 29 MOTION for Leave to File Sur-Reply.(nhall) (Entered: 11/18/2011)
39	11/18/11	Minute Entry for proceedings held before District Judge

No.	Filed	Docket Text
		James C. Cacheris: Sealed Minutes held on 11/18/2011. (Court Reporter J. Goodwin.) (jall) (Entered: 11/21/2011)
40	11/29/11	UNDER SEAL MEMORANDUM OPINION. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
41	11/29/11	SEALED DOCUMENT: Under Seal Memorandum Opinion. (jall) (Entered: 11/29/2011)
42	11/29/11	UNDER SEAL ORDER. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
43	11/29/11	MEMORANDUM OPINION. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
44	11/29/11	AMENDED ORDER. This Order amends the Courts Order of November 7, 2011, 24

No.	Filed	Docket Text
		to read as follows: For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that: (1) Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.s (collectively, Defendants) Motion to Seal Memorandum in Support of Defendants Motion to Dismiss 13 is GRANTED only as to Exhibit 3 and the portions of Defendants memorandum and exhibits that reference the Under Seal Action (as defined in the accompanying Memorandum Opinion) and is DENIED as to all other exhibits and materials. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
45	11/29/11	ORDER: For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that: (1) Relator Benjamin Carters

No.	Filed	Docket Text
		(Relator) Motion to Seal Portions of the Opposition to Defendants Motion to Dismiss 18 is GRANTED only as to the portions of Relators opposition and exhibits that reference the Under Seal Action (as defined in the accompanying Memorandum Opinion) and DENIED as to all other exhibits and materials;
		(2) Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.s (collectively, Defendants) Motion to Seal Reply Memorandum in Support of Defendants Motion to Dismiss 25 is GRANTED only as to Exhibit 9 and the portions of Defendants reply memorandum and exhibits that reference the Under Seal Action and is DENIED as to all other exhibits and materials;
		(3) Relators Motion to Seal his Motion for Leave to File Surreply 28 is DENIED;
		(4) Defendants Motion to Seal Defendants Response to Relators Motion for Leave to File

No.	Filed	Docket Text
		Sur-reply 33 is DENIED; (5) Relators Motion to Seal his Reply Memorandum in Support of his Motion for Leave to File Surreply 36 is DENIED. Signed by District Judge James C. Cacheris on 11/29/2011. (jall) (Entered: 11/29/2011)
46	12/07/11	NOTICE by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. re 45 Order,,,,, 44 Order,, Praecipe (Faust, John) (Entered: 12/07/2011)
47	12/07/11	Memorandum in Support re 11 MOTION to Dismiss Relator's Complaint [see Praecipe #46] filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 4, # 4 Exhibit 5, # 5 Exhibit 6, # 6 Exhibit 7, # 7 Exhibit 8)(Faust, John) (Entered: 12/07/2011)
48	12/07/11	Reply to Motion re 11 MOTION to Dismiss Relator's Complaint Reply Memorandum in Sup-

No.	Filed	Docket Text
		port of Defendants' Motion to Dismiss Relator's Complaint [see Praecipe #46] filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 10)(Faust, John) (Entered: 12/07/2011)
49	12/07/11	RESPONSE to Motion re 29 MOTION for Leave to File Sur-Reply Defendants' Response to Relator's Motion for Leave to File Sur-Reply [see Praecipe #46] filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 11)(Faust, John) (Entered: 12/07/2011)
50	12/08/11	Consent MOTION to Unseal Document 42 Sealed Order, 40 Memorandum Opinion by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit)(Faust, John) (Entered: 12/08/2011)
51	12/08/11	Sealed Document-Exhibit Un-

No.	Filed	Docket Text
		der Seal re 50 Consent MOTION to Unseal Document 42 Sealed Order, 40 Memorandum Opinion. (nhall) (Entered: 12/08/2011)
52	12/08/11	NOTICE by Benjamin Carter NOTICE OF FILING OF UNREDACTED COPIES OF RECENT BRIEFS (Holmes, William) (Entered: 12/08/2011)
53	12/08/11	Opposition to 47 Memorandum in Support, filed by Benjamin Carter. (Holmes, William) (Entered: 12/08/2011)
54	12/08/11	MOTION for Leave to File Sur-Reply (Unredacted Copy) by Benjamin Carter. (Attachments: # 1 Proposed Order Proposed Order)(Holmes, William) (Entered: 12/08/2011)
55	12/08/11	REPLY to Response to Motion re 54 MOTION for Leave to File Sur-Reply (Unredacted Copy) filed by Benjamin Carter. (Holmes, William) (Entered: 12/08/2011)
56	12/12/11	ORDER granting 50 Motion to Unseal Document. (See Order For Details). Signed by District

No.	Filed	Docket Text
		Judge James C. Cacheris on 12/12/11. (nhall) (Main Document 56 replaced on 12/12/2011) (nhall,). (Entered: 12/12/2011)
57	12/12/11	MEMORANDUM OPINION re: 11 MOTION to Dismiss Relator's Complaint by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc., 29 MOTION for Leave to File Sur-Reply by Benjamin Carter. (See Memorandum Opinion For Details). Signed by District Judge James C. Cacheris on 12/12/11. (nhall) (Entered: 12/12/2011)
58	12/12/11	ORDER for the reasons stated in the accompanying Memorandum Opinion granting, 29 MOTION for Leave to File Sur-Reply filed by Benjamin Carter, denying, 11 MOTION to Dismiss Relator's Complaint filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (See Order For Details). Signed by District Judge James C. Cacheris on 12/12/11. (nhall) (Entered:

No.	Filed	Docket Text
		12/12/2011)
59	12/28/11	NOTICE OF APPEAL as to 42 Sealed Order by Benjamin Carter. Filing fee $ 455, receipt number 0422-2843401. (Holmes, William) (Entered: 12/28/2011)
65	03/18/13	PUBLISHED Opinion of USCA re 59 Notice of Appeal-- Reversed and remanded. (gwal,) (Entered: 03/18/2013)
66	03/18/13	USCA JUDGMENT as to 59 Notice of Appeal filed by Benjamin Carter. In accordance with the decision of this court, the judgment of the district court is reversed. This case is remanded to the district court for further proceedings consistent with the court's decision. This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41. (gwal,) (Entered: 03/18/2013)
68	04/23/13	ORDER of USCA as to 59 Notice of Appeal filed by Benjamin Carter. The petition for rehearing en banc was circulated to the full court. No judge re-

No.	Filed	Docket Text
		quested a poll under Fed. R. Ap. P. 35. The court denies the petition for rehearing en banc. (nhall) (Entered: 04/25/2013)
69	05/01/13	USCA Mandate re 59 Notice of Appeal. The judgment of this court, entered 03/18/2013, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. (nhall) (Entered: 05/01/2013)
70	05/01/13	USCA Mandate re 59 Notice of Appeal. The judgment of this court, entered 3/18/2013, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of FRAP. (rban,) (Entered: 05/02/2013)
75	05/28/13	Minute Entry for proceedings held before District Judge James C. Cacheris: Status Conference held on 5/28/2013. Appearance of Counsel for Pltf. and Deft. Pltf. requests that the deft. and Govt. notify the Court and pltf. if they know of any other cases

No.	Filed	Docket Text
		that have been filed or any other cases they are going to maintain. Pltf. ordered to submit an order. 30 days to file brief; 20 days to respond; and 10 days to reply w/MOTION HEARING set for 9/06/2013 at 10:00 a.m. in Alexandria Courtroom 1000 before District Judge James C. Cacheris. (Court Reporter J. Egal.) (jall) (Entered: 05/28/2013)
77	05/30/13	Letter *and Proposed Order re Doc. No. 75.* (Ludwig, David) (Entered: 05/30/2013)
78	05/31/13	Letter re Relator's proposed order. (Faust, John) (Entered: 05/31/2013)
79	06/03/13	Letter *and Proposed Order re Doc. No. 75 (corrected version of Doc. No. 77)).* (Ludwig, David) (Entered: 06/03/2013)
80	06/04/13	ORDER: This matter having come on for a status conference before this Court, and the Court having

No.	Filed	Docket Text
		considered the oral presentations of counsel and for other good cause shown, it is hereby ORDERED that: (1) Defendants application for a stay pending their submission of a Petition for Certiorari to the United States Supreme Court is DENIED; (2) The parties shall submit supplemental briefs sufficient to update their arguments before the Court. These supplemental briefs should focus in particular on the public disclosure and original source issues, including, but not limited to, cases and other relevant authority issued since the Courts previous hearing held on November 18, 2011; (3) Accordingly, the Court sets the following schedule: (a) Defendants supplemental briefing shall be due on June 24, 2013; (b) Relators supplemental briefing shall be due on July 15, 2013; (c) Defendants reply, if any, shall be due on July 25, 2013;

No.	Filed	Docket Text
		(d) The Court shall hear oral argument on the supplemental briefing on September 6, 2013 at 10:00 a.m.;
		(4) The Court directs Defendants to promptly notify Relators counsel and this Court of any pending cases that they maintain may jurisdictionally preclude the re-filing litigation and/or trial of the above-referenced matter. This shall be a continuing obligation which shall apply until this matter either is dismissed with prejudice by this Court and/or is re-filed by the Relator in theevent of a dismissal without prejudice
		(5) Recognizing the Governments concerns and its position that (1) qui tam filings filed under 31 U.S.C. § 3730 are filed under seal (§ 3730(b)(2)) and, therefore, bar disclosure unless permission is granted by the court where the qui tam is filed, (2) that first-to-file jurisdictional limitations involve questions of fact and law under §3730(e) that can be determined only after adequate review of the filing and information that may be obtained outside of the qui tam

No.	Filed	Docket Text
		complaint, and (3) that jurisdictional issues are never waived, the Court directs the knowledgeable officers of the United States Departmentof Justice to provide timely notice to this Court of other actions that have been filed or may be filed under 31 U.S.C. § 3730(b) which could nullify the jurisdiction of this Court over the instant action. Signed by District Judge James C. Cacheris on 6/04/2013. (jall) (Entered: 06/12/2013)
82	06/25/13	Memorandum in Support re 11 MOTION to Dismiss Relator's Complaint SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS UNDER THE PUBLIC DISCLOSURE BAR filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Attachments: # 1 Exhibit 12, # 2 Exhibit 13)(Faust, John) (Entered: 06/25/2013)
83	07/15/13	Memorandum in Opposition re 11 MOTION to Dismiss Relator's Complaint

No.	Filed	Docket Text
		SUPPLEMENTAL BRIEF IN SUPPORT OF RELATOR'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER THE PUBLIC DISCLOSURE BAR filed by Benjamin Carter. (Ludwig, David) (Entered: 07/15/2013)
84	07/25/13	REPLY to Response to Motion re 11 MOTION to Dismiss Relator's Complaint SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER THE PUBLIC DISCLOSURE BAR filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. (Faust, John) (Entered: 07/25/2013)
86	09/06/13	Minute Entry for proceedings held before District Judge James C. Cacheris: Motion Hearing held on 9/6/2013 re 11 MOTION to Dismiss Relator's Complaint filed by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc.. Appear-

No.	Filed	Docket Text
		ances of Counsel for Pltf. and Deft. Matter argued and TAKEN UNDER ADVISEMENT. Order to follow. (Court Reporter J. Egal.) (jall) (Entered: 09/10/2013)
87	09/19/13	MEMORANDUM OPINION re: 11 MOTION to Dismiss Relator's Complaint by Halliburton Co., KBR, Inc., Kellogg Brown & Root Services, Inc., Service Employees International, Inc. (See Memorandum Opinion For Details). Signed by District Judge James C. Cacheris on 9/19/13. (nhall) (Entered: 09/20/2013)
88	09/19/13	ORDER. For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that: (1) Defendant Halliburton Co.'s ("Defendant") Motion to Dismiss [Dkt. 11] is DENIED; (2) in accordance with the Court's affirmed dismissal on the grounds of the FCA's first-to-file bar [Dkts. 65-66], Relator's Complaint [Dkt. 1] is DISMISSED WITHOUT PREJUDICE. (See Order For

No.	Filed	Docket Text
		Details). Signed by District Judge James C. Cacheris on 9/19/13. (nhall) (Entered: 09/20/2013)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12-1011

UNITED STATES EX REL. BENJAMIN CARTER,

Plaintiff - Appellant

v.

HALLIBURTON CO.; KELLOGG BROWN & ROOT SERVICES, INC.; SERVICE EMPLOYEES INTERNATIONAL INC.; KBR, INC.,

Defendants – Appellants.

RELEVANT DOCKET ENTRIES

No.	Filed	Docket Entry
1	01/04/12	Case docketed. Originating case number: 1:11-cv-00602-JCC-JFA. Case manager: MRadday. Date notice of appeal filed: 12/28/2011 [12-1011] (MR)
6	01/18/12	DOCKETING STATEMENT by Appellant United States ex rel. Benjamin Carter. [12-1011] William Holmes

No.	Filed	Docket Entry
7	01/18/12	SEALED DOCUMENT by United States ex rel. Benjamin Carter. Document type: OTHER DOCUMENT for. Date and manner of service: 01/18/2012 ecf. Filed Ex parte: N. [998767642] [12-1011] William Holmes
13	01/18/12	CERTIFICATE OF CONFIDENTIALITY (Local Rule 25(c)) by United States ex rel. Benjamin Carter. Sealing Required: No.. [12-1011] William Holmes
23	04/09/12	BRIEF by Appellant United States ex rel. Benjamin Carter in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: mail. [998828372] [12-1011] William Holmes
24	04/09/12	CERTIFICATE OF CONFIDENTIALITY (Local Rule 25(c)) by United States ex rel. Benjamin Carter. Sealing Required: No.. [12-1011] William Holmes
25	04/09/12	SEALED BRIEF by Appellant United States ex rel. Benjamin Carter in electronic and paper

No.	Filed	Docket Entry
		format. Type of Brief: Opening. Method of Filing Paper Copies: mail. Date Copies Mailed, Dispatched, or Delivered: 04/09/2012.. Filed Ex parte: N. [12-1011] William Holmes
28	04/09/12	Redacted OPENING BRIEF (PAPER) file-stamped, on behalf of United States ex rel. Benjamin Carter. Number of pages: [70]. Sufficient: YES. Entered on Docket Date: 04/18/2012. [998834782] [12-1011] (MR)
29	04/09/12	SEALED BRIEF (PAPER) file-stamped on behalf of United States ex rel. Benjamin Carter. Type of Brief: Opening Number of pages: [70]. Entered on Docket Date: 04/18/2012. Filed Ex parte: N. [998834795] [12-1011] (MR)

No.	Filed	Docket Entry
30	04/09/12	APPENDIX (PAPER) file-stamped, on behalf of United States ex rel. Benjamin Carter. Total number of volumes (including any sealed): 4. Total number of pages in all volumes: 549. Total number of sealed volumes: 3. Sufficient? Yes. CD/DVD/Other exhibit? No. If yes was it placed in brief box? N/A. Entered on Docket Date: 04/18/2012. [998834802] [12-1011] (MR)
31	04/18/12	ORDER filed [998834817] sealing. Sealed version of appellant's opening brief and Joint Appendix Volumes II-IV. Copies to all parties... [12-1011] (MR)
32	05/11/12	SEALED BRIEF by Appellees Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: courier. Date Copies Mailed, Dispatched, or Delivered: 05/11/2012.. Filed Ex parte: N. [12-1011] John Faust

No.	Filed	Docket Entry
33	05/11/12	CERTIFICATE OF CONFIDENTIALITY (Local Rule 25(c)) by Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. Sealing Required: No.. [12-1011] John Faust
34	05/11/12	Redacted BRIEF by Appellees Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 05/11/2012. [998853019] [12-1011] John Faust

No.	Filed	Docket Entry
35	05/11/12	Redacted RESPONSE BRIEF (PAPER) file-stamped, on behalf of Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. Number of pages: [76]. Sufficient: YES. Entered on Docket Date: 05/15/2012. [998854519] [12-1011] (MR)
36	05/11/12	SEALED BRIEF (PAPER) file-stamped on behalf of Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. Type of Brief: Response Number of pages: [76]. Entered on Docket Date: 05/15/2012. Filed Ex parte: N. [998854536] [12-1011] (MR)
37	05/15/12	ORDER filed [998854541] sealing. sealed version of appellees' response brief. Copies to all parties... [12-1011] (MR)

No.	Filed	Docket Entry
38	05/25/12	CERTIFICATE OF CONFIDENTIALITY (Local Rule 25(c)) by United States ex rel. Benjamin Carter. Sealing Required: No.. [12-1011] William Holmes
39	05/25/12	SEALED BRIEF by Appellant United States ex rel. Benjamin Carter in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: mail. Date Copies Mailed, Dispatched, or Delivered: 05/25/2012.. Filed Ex parte: N. [12-1011] William Holmes
40	05/25/12	BRIEF by Appellant United States ex rel. Benjamin Carter in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 05/25/2012. [998862296] [12-1011] William Holmes

No.	Filed	Docket Entry
43	05/25/12	Redacted REPLY BRIEF (PAPER) file-stamped, on behalf of United States ex rel. Benjamin Carter. Number of pages: [40]. Sufficient: YES. Entered on Docket Date: 06/07/2012. [998870524] [12-1011] (MR)
44	05/25/12	SEALED BRIEF (PAPER) file-stamped on behalf of United States ex rel. Benjamin Carter. Type of Brief: Reply Number of pages: [40]. Entered on Docket Date: 06/07/2012. Filed Ex parte: N. [998870529] [12-1011] (MR)
45	06/07/12	ORDER filed [998870536] sealing. sealed version of appellant's reply brief. Copies to all parties... [12-1011] (MR)
47	08/15/12	CASE CALENDARED for oral argument. Date: 10/26/2012. Registration Time: 7:45 8:00. Daily Arguments Begin: 8:30. [12-1011] (JLE)

No.	Filed	Docket Entry
50	10/03/12	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellees Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. [998951682]. [12-1011] John Faust
51	10/09/12	RESPONSE/ANSWER by United States ex rel. Benjamin Carter to Supplemental Authorities [50]. [12-1011] William Holmes
52	10/15/12	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellees Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. [998959744]. [12-1011] John Faust
53	10/19/12	RESPONSE/ANSWER by United States ex rel. Benjamin Carter to Supplemental Authorities [52]. [12-1011] William Holmes

No.	Filed	Docket Entry
54	10/26/12	ORAL ARGUMENT heard before the Honorable G. Steven Agee, James A. Wynn, Jr. and Henry F. Floyd. Attorneys arguing case: Mr. William Clifton Holmes for Appellant United States ex rel. Benjamin Carter and Mr. John Martin Faust for Appellees Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. Courtroom Deputy: Lisa Robertson. [998968837] [12-1011] (LER)
55	11/02/12	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) by Appellees Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. [998974150]. [12-1011] John Faust

No.	Filed	Docket Entry
56	11/08/12	SUPPLEMENTAL AUTHORITIES (FRAP 28(j)) response by United States ex rel. Benjamin Carter to Supplemental Authorities [55]. [12-1011]--[Docket Text Edited to Correct Docketing Event 11/09/2012 by ALC] William Holmes
57	03/18/13	PUBLISHED AUTHORED OPINION filed. Originating case number: 1:11-cv-00602-JCC-JFA Paper copies to all parties and the district court/agency. [999066052]. [12-1011] (MR)
58	03/18/13	JUDGMENT ORDER filed. Disposition method: 12-1011 opn.p.arg. Decision: Reversed and remanded. Originating case number: 1:11-cv-00602-JCC-JFA. Entered on Docket Date: 03/18/2013. [999066056] Copies to all parties and the district court/agency.. [12-1011] (MR)

No.	Filed	Docket Entry
60	04/01/13	PETITION for rehearing en banc (FRAP 35) by Appellees Halliburton Company, KBR, Incorporated, Kellogg Brown & Root Services, Incorporated and Service Employees International Incorporated. [12-1011] John Elwood
61	04/01/13	MOTION by Amicus Curiae Chamber of Commerce of the United States of America to file amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal outside time allowed by FRAP 29(e).. Date and method of service: 04/01/2013 ecf. [999077101] [12-1011] Jonathan Franklin
62	04/01/13	DOCUMENT STRICKEN UPON ENTRY OF ORDER DENYING LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC. [12-1011]--[Edited 04/23/2013 by MR] Jonathan Franklin
63	04/01/13	Mandate stayed by FRAP 41(d)(1). [12-1011] (DHB)

No.	Filed	Docket Entry
64	04/01/13	NOTICE ISSUED to Mr. Thomas Mansfield Dunlap for United States ex rel. Benjamin Carter and Mr. David Ludwig for United States ex rel. Benjamin Carter requesting response to Motion to file amicus curiae brief [61]Response due: 04/02/2013.[999077386].. [12-1011] (TW)
66	04/02/13	RESPONSE/ANSWER by United States ex rel. Benjamin Carter to notice requesting response [64], Motion to file amicus curiae brief [61]. Nature of response: in opposition. [12-1011] David Ludwig
68	04/05/13	REPLY by Chamber of Commerce of the United States of America to Response [66], Motion to file amicus curiae brief [61]. [12-1011] Jonathan Franklin
69	04/23/13	COURT ORDER filed [999093052] denying Motion to file amicus curiae brief [61] Copies to all parties.. [12-1011] (MR)

No.	Filed	Docket Entry
70	04/23/13	COURT ORDER filed [999093053] denying Motion for rehearing en banc [60] Copies to all parties.. [12-1011] (MR)
71	05/01/13	Mandate issued. Referencing: [58] Judgment Order , [57] Published Authored Opinion. Originating case number: 1:11-cv-00602-JCC-JFA.. [12-1011] (MR)
72	06/27/13	SUPREME COURT REMARK--petition for writ of certiorari filed. 06/24/2013. 12-1497. [12-1011] (AW)
73	07/01/13	SUPREME COURT REMARK--petition for writ of certiorari granted. 07/01/2014 [12-1011] (AW)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES *ex rel.*, BENJAMIN CARTER,	:	
	:	
Plaintiff,	:	UNDER SEAL
v.	:	
		1:08CV1162 (JCC/JFA)
HALLIBURTON *et al.*,	:	
	:	
Defendant.		

MEMORANDUM OPINION

This case is before the Court on Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 31 U.S.C. § 3730(b)(5). [Dkt. 291.] Specifically, Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc. and Service Employees International, Inc. (collectively "Defendants" or "KBR") invoke § 3730(b)(5) of the False Claims Act ("FCA") which bars a Relator from "bring[ing] a related action based on the facts under-

lying the pending action." 31 U.S.C. § 3730(b)(5). This provision is "known colloquially as the Act's first-to-file bar." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 (10th Cir. 2004); *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989)(explaining that "this provision establishes a first in time rule"). It is undisputed that section 3730(b)(5) is jurisdictional in nature; a Court cannot properly have jurisdiction over a FCA *qui tam* action when it is based on the facts underlying a pending case. *Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) (referring to § 3730(b)(5) as a jurisdictional bar); *Grynberg* 390 F.3d at 1279 n.1 (finding § 3730(b)(5) "is a jurisdictional limit on the courts' power to hear certain duplicative *Qui Tam* suits"). The issues before the Court are (1) whether this action, No. 1:08cv1162 (JCC/JFA), is "related" to an under seal action filed in the Central District of California, No. 05cv08924; and (2) whether the California action can properly be considered "pending" as Plaintiff argues it is legally insufficient. For the following reasons, this Court will grant Defendants' Motion.

I. Background

On March 23, 2010, in the week before trial, the Department of Justice ("DOJ") disclosed to the parties the existence of Civil Action No. 05cv08924 in the Central District of California filed on December 23, 2005 (the "California Case"). The case before this Court was filed in February 2006, while the California Case was filed in December 2005. [*See* Dkt. 5.] Relator Carter and California Relators, former employees of the Defendants, brought separate FCA *qui tam* actions alleging that Defendants falsely billed

the government for services provided to United States Military Forces serving overseas. Determining whether § 3730(b)(5) bars Carter's action as a "related action based on the facts underlying the pending [California] action" necessarily involves reviewing the facts and allegations of the under seal California action.

A. California Action

The California case alleges that that Defendants "knowingly submitted, or caused to be submitted, false claims for payment to the United States, as set forth above, in violation of 31 U.S.C. § 3729(a)(1)." (California Compl. ¶ 21.) California Relators further allege that "defendants knowingly made or used false records or statements to get false or fraudulent claims paid by the United States, in violation of 31 U.S.C. § 3729(a)(2)." (California Compl. ¶ 21.) In support of these allegations California Relators specifically claim that "from approximately December 2001 to present, defendants defrauded the DOD by systematically inflating, and causing to be inflated, labor costs incurred on the LOGCAP III Contract."[1] (California Compl. ¶ 13.) Defendants "routinely instructed employees to charge no less than 12 hours of work per day, 7 days per week, on their time sheets even though most of those hours were never worked." (California Compl. ¶ 13.) The California Complaint continues to allege that "defendants knowingly inflated labor costs by [i]nflating hours worked on timesheets on a daily basis to reflect 84 hours a week that man-

[1] LOGCAP III was the Logistics Civil Augmentation Program (LOGCAP) contract put out by the Department of Defense for civil logistical support for military operations "in Iraq, Afghanistan, and other countries." (California Compl. ¶ 2.)

agement required of every employee in order to meet corporate mandated goals." (California Compl. ¶ 23.) By "every employee," California Relators include all of the estimated "40,000 employees in Iraq." (California Compl. ¶¶ 2, 13, 23.) The over-charging allegedly occurred "from approximately December 2001 to present [December 2005]" and that "[defendant] KBR's timekeeping policy and timesheet and work hours guidelines for the LOGCAP III Contract mandat[ed] a goal of 84 hours to be charged by their employees every week" regardless of the time actually worked. (California Compl. ¶ 14.) California Relators also allege that this "practice of inflating labor costs extends to Kuwait, Djibouti, Republic of George, and Uzbekistan" in addition to Iraq and Afghanistan. (California Compl. ¶ 23.) There are no limitations as to the type of work that was allegedly being over-charged.

The two California Relators worked exclusively in Iraq and Afghanistan. Relator 1 was working for Defendants in Iraq as a plumber. He was stationed at two camps in Iraq from August 23, 2005 until December 16, 2005, for approximately 115 days. (California Compl. ¶¶ 15-19.) During that time period he was allegedly directed by KBR Human Resources and other supervisors to always charge 12-hour days on his time sheets, and spoke with other individuals who were told to do the same. (California Compl. ¶¶ 15-19.) Relator 2 was originally hired to work as a carpenter but was transferred to a role as an Administrative Specialist where he processed time sheets and work orders. (California Compl. ¶¶ 20-22.) Relator 2 was stationed in Uzbekistan and Afghanistan from August, 2004 until August, 2005 – for approximately one year. (California Compl. ¶¶ 20-22.) During his time as an Administrative Specialist, Relator 2 found

that "it was common for employees to just sit around waiting for work, but KBR required that they be shown as 'on the clock' 12 hours every day, and submit 12 hours on their timesheets." (California Compl. ¶ 21.) Relator 2 created a personal database comparing the time entered in work orders and daily work logs with the inflated time entered on the timesheets. (California Compl. ¶ 21.) At no time were the California Relators stationed with the Relator in this case.

B. Carter's Action

Here, Relator Benjamin Carter filed his original Complaint under seal on February 1, 2006 in California (*See* Mem. in Supp. of Mot. to Dismiss at 3, n. 2); his first Amended Complaint on February 10, 2006 [Dkt. 5]; and the current Second Amended Complaint on January 28, 2009 (Dkt. 92).[2] There is no dispute that Carter's action was filed after the California Complaint. Relator presently alleges, that Defendants "knowingly presented [or caused to be presented] to an officer or employee of the United States Government false or fraudulent claims for payment or approval" in violation of 31 U.S.C. § 3729(a)(1).[3] (Second Amended Complaint ("SAC") ¶¶ 157-158; *See* Am. Compl. ¶ 17.) Relator also alleges that "Defendants knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the

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[2] Carter's counsel at the time of the original filing was Don Warren, the same California attorney who represented the California Relators in their *qui tam* action.

[3] Section 3729(a)(1) has been re-codified since Relator filed his Second Amended complaint and is now codified at 31 U.S.C. § 3729(a)(1)(A).

Government" violation of 31 U.S.C. § 3729(a)(2). (SAC ¶¶ 192-193; Am. Compl. ¶ 17.)

The conduct underlying Relator's claims is that while Relator was working in Iraq, he and his fellow employees were ordered to record time entries on time sheets for work that they did not perform and that these false time sheets were submitted to the Government for payment for work that was not performed. Relator was in Iraq from mid-January 2005 until April 2005 where he was employed by Defendants as a Reverse Osmosis Water Purification Unit ("ROWPU") Operator. (SAC ¶¶ 3, 41, 69.)

During that period he worked at two camps, Al Asad and Ar Ramadi. (SAC ¶¶ 41, 69.) Relator alleges "the Al Asad Defendant ROWPU employees were not engaged in any actual water purification duties on discrete dates in January 2005" but nevertheless, the "Al Asad ROWPU employees' time were billed under LOGCAP III" as if they had been working. (SAC ¶¶ 130-131.) Similarly, while working at Ar Ramadi, Relator was "required to fill in timecards stating that he worked 12 hour [sic] a day, each day, with uniformity, on ROWPU functions " and during this time Relator "actually worked 0 hours per day on ROWPU functions." (SAC ¶¶ 54-55.) Relator also alleges that all "trade employees" such as himself were required to submit time cards totaling "exactly 12 hours per day and 84 hours per week" and that it was the "routine practice" of these employees to do so. (SAC ¶¶ 60-61, 65, 67-68.) In essence, Relator contends that Defendants had knowledge that at the Ar Ramadi and Al Asad camps in Iraq, ROWPU "personnel were not engaged in any water testing or purification duties in support of the LOGCAP Contract;" and "[d]efendants were billing the Government

for work that was not actually performed." (SAC ¶¶ 163, 166.) In support of these allegedly false claims, Defendants presented the falsified time sheets of ROWPU employees. (SAC ¶¶ 192-193.)

II. Standard of Review

Defendants' Move to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and 31 U.S.C. § 3730(b)(5). Title 31 U.S.C. § 3730(b)(5) states: "when a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). If an action based on the facts underlying a pending case comes before the court, a court must dismiss the later filed case for lack of jurisdiction. *See Lujan*, 243 F.3d at 1187; *Grynberg*, 390 F.3d at 1279.

III. Analysis

This Court's analysis focuses on two issues. First, the Court must determine whether the action before it is "related" to the first-filed action. Second, it must determine if the California action is properly considered "pending" so as to act as a jurisdictional bar to the instant case. The Court will address them each in turn.

A. Related Action

In interpreting what constitutes a "related action" under this provision, the Court shall first look to the plain language of the statute. "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's

meaning, in all but the most extraordinary circumstance, is finished." *Ramey v. Director, Office of Workers' Compensation Program*, 326 F.3d 474, 476 (4th Cir. 2003) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive Relator/plaintiff's from bringing related actions based on the same underlying facts. *See Lujan*, 243 F.3d at 1187. Importantly, Congress drafted the statute to bar all "related actions" not all "identical actions," thus a subsequent action may differ from a first-to-file action, yet nevertheless be jurisdictionally barred so long as it is considered a "related" action. *See Grynberg*, 290 F.3d at 1279 (holding "an identical facts test would be contrary to the plain meaning of the statute, which speaks of 'related' *qui tam* actions, not identical ones.") Some courts have held that "if the later-filed complaint alleges the same type of wrongdoing as the first, and the first adequately alleges a broad scheme encompassing the time and location of the later filed, the fact that the later complaint describes a different time period or geographic location . does not save it from the absolute first-to-file bar of § 3730(b)(5)." *U.S. ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F.Supp.2d 8, 13 (D.D.C. 2003).

In determining if the actions are "related," courts have adopted slight variations of a common approach:

§ 3730(b)(5) is an "exception-free" provision that bars subsequently filed actions alleging the "same material elements described in an earlier suit, regardless of whether the allegations incorporate somewhat differ-

ent details."[4] *Lujan*, 243 F.3d at 1189. These variations stem from a two-prong test first used in the Eastern District of Virginia case of *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989). There the court found that "the *qui tam* complaint filed first blocks subsequent *qui tam* suits" unless it is "(a) based on facts different from those alleged in the prior suit and (b) gives rise to separate and distinct recovery by the government." *Id.* at 918. Similar tests have arisen in the District of Connecticut where the later claim is barred unless it "(1) it alleges a different type of wrongdoing, based on different material facts than those alleged in the earlier suit; and (2) it gives rise to a separate recovery of actual damages by the government"[5] and the District of Columbia where a later-filed *qui tam* complaint is barred unless "(1) it alleges a different type of wrongdoing, based on different material facts than those alleged in the earlier suit; and (2) it gives rise to separate and distinct recovery by the government"[6]. This Court finds the *Erickson* approach most appropriate in this case and will thus find that Carter's suit is barred unless: (1) it is based on facts different from those alleged in the prior suit; and, (2) gives rise to separate and distinct recovery by the government. *See Erickson* at 918. In

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[4] Some Courts have required the same "type of fraud;" (*See Grynberg*, 290 F.3d at 1280) the same "essential facts;" (*See United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs*, 149 F.3d 227, 232 (3rd Cir. 1998)) or the same "material elements of fraud" (*Lujan*, 243 F.3d at 1189).

[5] *United States ex rel. Capella v. United Technologies Corp.*, No. 3:94-CV02063 (EBB), 1999 WL 464536 (D.Conn. June 3, 1999).

[6] *Ortega v.*, 240 F.Supp.2d at 12 (D.D.C. 2003)

determining whether the first-to-file bar applies, the Court looks "at the facts as they existed at the time that action was brought." *Grynberg*, 390 F.3d at 1279.

The Court first examines whether the claims are "based on facts different from those alleged in the prior suit." *Erickson*, 716 F. Supp. at 908. Both cases are brought alleging that Defendants submitted false claims of payment to the Government and falsified records in support of that end. Here, Relator Carter alleges that ROWPU personnel were not performing ROWPU operations of water testing and purifying as evidenced by the condition of the water and the observations of Relator and others. (SAC ¶¶ 42-49, 52, 55-56, 77-78, 80-86, 89-94, 163; *See* Am. Compl. ¶¶ 11-15.) Nevertheless, according to Carter's Complaint, Defendants required, and it was common practice of employees to submit, time sheets fraudulently showing employees worked "exactly 12 hours per day and 84 hours per week." (SAC ¶¶ 53-58, 60-61, 65, 67-70; *See* Am. Compl. ¶ 9.) Relator Carter originally alleged that this occurred "from approximately December 2001 to present" and that it occurred at "all military bases in Iraq" (Am. Compl. ¶ 11), Relator currently alleges false claims submitted based on time sheets recording hours worked between September 1, 2004 to April 2005 at the Al Asad and Ar Ramadi bases in Iraq. (SAC ¶¶ 61, 131, 191.) It is the submission of the false timesheets in support of the false claim for payment for the ROWPU services that were not actually performed that forms the basis of Relator's claims.

The California Complaint casts a broader net. The California Relators allege that Defendants had a policy of fraud for LOGCAP III employees, including "trade employees" such as ROWPU employee Carter,

requiring the employees to record twelve hours worked per day, seven days a week on their time sheets regardless of the time actually worked. (California Compl. ¶¶ 13-14.) These allegations encompass activity "from December 2001 to the present," including the period covered by Relator Carter's allegations. (California Compl. ¶ 13.) The California Relators allege that the Defendants' illegal conduct occurred across all of the countries covered by the LOGCAP III contract, thus including, but not specifically naming, the Al Asad and Ar Ramadi bases alleged by Carter. (California Compl. ¶ 23.)

Relator Carter argues that the California case can be distinguished in several ways. First, Relator argues, "in short, Mr. Carter is the first to file a complaint alleging that the Defendants falsely billed the Government for ROWPU work not performed." (Opp. at 8.) This narrow reading of the complaints is premised on the fact that the California Relators were not in Iraq, let alone at the Al Asad and Ar Ramadi camps, until August 2005, after Relator Carter had left. (Opp. at 8.) The first-to-file bar can apply even when there are geographic and temporal differences in the allegations. *See e.g., Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009) (holding that "a relator cannot avoid § 3730(b)(5)'s first-to-file bar by simply adding factual details or geographic locations to the essential or material elements" of an earlier-filed fraud claim); *Lujan*, 243 F.3d at 1189. The California case alleges that Defendants "knowingly submitt[ed] false records or statements to get false claims paid, by systematically inflating labor costs incurred on the [LOGCAP III] contract in Iraq." (California Compl. ¶ 2.) Specifically they "routinely instruct[ed] the LOGCAP III employees to charge no

less than 12 hours of work per day, 7 days per week, on their timesheets even though most of those hours were never worked." (California Compl ¶ 13.) The first filed complaint covers all LOGCAP III employees in Iraq from December 2001 to the date of filing, it is a "broad scheme encompassing the time and location of [Carter's complaint]." *See United States ex rel. Ortega*, 240 F.Supp.2d at 13. Carter's action encompasses conduct that is a subset of the conduct alleged in the California case.

Relator here next tries to characterize the California case as "an overbilling for work performed case" and "Mr. Carter's [a]s a no purification and testing fraud case." (Opp. at 10.) This is not accurate. Mr. Carter has brought a FCA case, alleging that Defendants "knowingly presented [or caused to be presented] to an officer or employee of the United States Government false or fraudulent claims for payment or approval" in violation of 31 U.S.C. § 3729(a)(1) and that "Defendants knowingly made, used, or caused to be made or sues, false records or statements to get false or fraudulent claims paid or approved by the Government" violation of 31 U.S.C. § 3729(a)(2). (SAC ¶¶ 157-158, 192-193; Am. Compl. ¶ 17.) To prove his case, Carter must show that Defendant employees were reporting hours on timesheets that they did not work and that Defendants, in turn, falsely billed the Government. The "no purification and testing" issue in the case is merely evidence that the time sheets filled out by ROWPU personnel, whose only responsibilities were water "purification and testing," were false. The California case alleges that LOGCAP III employees falsely recorded hours on timesheets that they did not work, resulting in false billings of their labor to the Government. (Cali-

fornia Compl. ¶ 2, 12-32.) This is "same type of wrongdoing," as seen in Carter's case, albeit across a broader spectrum of LOGCAP III tasks. *See Lujan*, 243 F.3d at 1188. Here the Court finds that Relator Carter's case is not based on facts that are materially different from those alleged in the California case.

Next the Court examines whether Carter's action "gives rise to separate and distinct recovery by the government." *Erickson*, 716 F. Supp. at 908. Given that the factual allegations of Carter are simply a subset of the allegations in the California complaint, the recovery for false billing sought by Relator Carter on behalf of the government are also a subset of the recovery available to the government if there is a successful recovery in the California case. If the government is successful in its intervention in the California case it would recover for the false billing of 12 hours a day, seven days a week by all LOGCAP III employees, submitted from December 2001 until the present, for all types of LOGCAP III work on all bases covered by the LOGCAP III contract. Carter's recovery is limited to the over-billing that occurred by ROWPU personnel at the Al Asad and Ar Ramadi bases between September 2004 and April 2005. The potential recovery for Carter's allegations would be a limited subset of this the California recovery.

As a subset of the California case, Carter's action clearly must be considered a "related action" under § 3730(b)(5) as it is not "based on facts different from those alleged in the prior suit" and does not "give[ ] rise to separate and distinct recovery by the govern-

ment."[7] *Erickson*, 716 F. Supp. at 908. After determining that Carter's action must be considered a "related action" to the California case, for this to function as a jurisdictional bar this Court must determine that the California case is "pending" within the meaning of § 3730(b)(5).

B. Pending Action

Section 3730(b)(5) bars plaintiffs from bringing a "related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). It is not disputed that the California case has not been yet been dismissed by the District Court of California, nevertheless, Relator argues that his action cannot be barred under the first-to-file rule because the California action fails to plead fraud with the particularity as required by Federal Rule of Civil Procedure 9(b). (Opp. at 16-17.) Neither of the parties nor this Court has discovered any Fourth Circuit precedent supporting Relator's argument. Accordingly, this Court again turns to the plain language of the statute in finding that the California action is "pending" thus barring Relator Carter's "related action."

"When a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Ramey*, 326 F.3d at 476; *Cowart*, 505 U.S. at 475. Section 3730(b)(5)'s plain language establishes a first-to-file bar, preventing successive plaintiffs from bringing suit while a related action is "pending." While Congress chose to allow exceptions to some

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[7] In fact, Carter's action must be considered a "related action" under both the *Capella*, 1999 WL 464536 at *2, and *Ortega*, 240 F.Supp.2d at 8, tests.

FCA provisions, such as § 3730(e)(4) (the public disclosure jurisdictional bar), § 3730(b)(5)'s plain language contains none. *See* 31 U.S.C. §§ 3730(b)(5), 3730(e)(4). "Moreover, an exception-free, first-to-file bar conforms with the dual purposes of the 1986 amendments [to the FCA]: to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs." *Lujan*, 243 F. 3d at 1187. (citing *LaCorte*, 149 F.3d at 233-34 (discussing legislative history)).

Relator argues that a first-filed complaint should "not preempt a later filed complaint if the initial complaint fails to satisfy Fed. R. Civ. P. 9(b)." (Opp. at 17.) In support of this proposition, Relator cites to several cases best exemplified by a pair of Sixth Circuit cases, *Walburn v. Lockheed Martin, Corp*, and *Poteet v. Medtronic* (which relies on *Walburn*). *Walburn*, 431 F.3d 966 (6th Cir. 2005); *Poteet*, 552 F.3d 503 (6th Cir. 2009). In *Walburn* the Sixth Circuit held that the first-filed complaint's "failure to comply with Rule 9(b) rendered it legally infirm from its inception, and therefore it cannot preempt [the later complaint] under the first-to-file bar." *Walburn*, 431 F.3d at 972. Similarly, the *Poteet* court held that "if the first complaint is either jurisdictionally precluded, *see* 31 U.S.C. § 3730(e), or legally incapable of serving as a complaint, *see* Fed. R. Civ. P 9(b), then it does not properly qualify as a 'pending action' brought under the FCA." *Poteet*, 552 F.3d at 516.[8] This reading of

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[8] There are a number of district courts that have followed the *Walburn* rationale. *See e.g. United States ex rel Hefner v. Hackensack Univ. Med. Ctr.*, 240 F.Supp.2d 8, 13 (D.D.C. 2003)(holding that "the strictures of Rule 9(b) limit the preclusive effect of the first-filed complaint to claims that can be pleaded with particularity, thus obviating the danger of oppor-

§3730(b)(5) use "the strictures of Rule 9(b) [to] limit the preclusive effect of the first-filed complaint to claims that can be pleaded with particularity, thus obviating the danger of opportunistic relators filing unsupported placeholder complaints for the sole purpose of preemption." *Ortega*, 240 F.Supp.2d at 13.

In contrast, the Ninth Circuit in *Lujan* found that the purpose of § 3730(b)(5) was to increase the Government's awareness of the fraudulent activities of its contractors and that "the first-filed claim provides the government notice of the essential facts of an alleged fraud," thus "alerting the government to the essential facts of the scheme" and allowing the government the opportunity to intervene. *Lujan*, 243 F. 3d at 1187. The *Lujan* court explicitly stated: "we reject [Relator's] contentions because they would require this court to read exceptions into the statute's plain language." *Id.*

Here, it is not disputed that the California case has not yet been dismissed. A plain reading of the statutory language indicates that a case that is not dismissed is clearly still "pending." There is no indication in the plain language of the statute indicating Congress's intent to carve out an exception to the first-to-file bar for actions that are currently pending but might later be dismissed based on Federal Rule of Civil Procedure Rule 9(b). Even where partial or complete dismissal of the first-filed case would be likely were a Rule 9(b) Motion made; and that potential dismissal would render the material facts and allegations of the two cases distinct; to follow the *Wal-*

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tunistic relators filing unsupported placeholder complaints for the sole purpose of preemption"); *United States. ex rel Poteet v. Lenke*, 604 F.Supp.2d 313 (D. Mass. 2009).

burn line of cases would require this Court to make a substantive determination about a case that is not before it. This Court will not do so. This Court finds that Carter's case, No. 1:09cv1162, is a "related action based on the facts underlying the pending [California] action" and is thus jurisdictionally barred. *See* 31 U.S.C. § 3730(b)(5); *Lujan* 243 F.3d at 1187; *Grynberg* 390 F.3d at 1279 n.1.

IV. Conclusion

For the reasons stated above, this Court will grant Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 31 U.S.C. § 3730(b)(5).

An appropriate Order will issue.

May 10, 2010
Alexandria, Virginia

/s/

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES *ex rel.*, BENJAMIN CARTER,	:	
	:	
Plaintiff,		
	:	UNDER SEAL
v.	:	
		1:08CV1162 (JCC/JFA)
HALLIBURTON *et al.*,	:	
	:	
Defendant.		

ORDER

This case is before the Court on Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 31 U.S.C. § 3730(b)(5). [Dkt. 291.] For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED:

(1) Defendants' Motion to Dismiss [291] is GRANTED; and,

(2) Plaintiff's Second Amended Complaint [92]

is hereby DISMISSED WITHOUT PREJUDICE pursuant to 31 U.S.C. § 3730(b)(5) and Federal Rule of Civil Procedure 12(b)(1); and

(3) the Clerk of the Court shall forward copies of this Order to all counsel of record.

THIS ORDER IS FINAL

May 10, 2010
Alexandria, Virginia

/s/

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BENJAMIN CARTER	:	
	:	
	:	
VS.	:	1:10-CV-864 JCC
	:	ALEXANDRIA,
	:	VIRGINIA
	:	MAY 13, 2011
HALLIBURTON	:	
COMPANY, ET AL.	:	
	:	
	:	

TRANSCRIPT OF MOTIONS HEARINGS BEFORE THE HONORABLE JAMES C. CACHERIS
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by Julie A. Goodwin.

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ALSO PRESENT:

MR. ROBERT MAGNANINI
MR. CRAIG MARGOLIS

MS. KATHRYN BRIDGET CODD
MS. SHARON STAGG
MR. DAVID LUDWIG

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[3] (May 13, 2011, 10:06 A.M., Open Court.)

THE COURT: Okay. I'll take the case of *Carter versus Halliburton*.

MR. HOLMES: Good morning, Your Honor.

THE COURT: Good morning.

MR. HOLMES: Clift Holmes from Stone and Magnanini.

MR. FAUST: And, Your Honor, for the defendants, John Faust, Tirzah Lollar --

THE COURT: Okay. Good morning.

MS. LOLLAR: Good morning.

MR. FAUST: With me today are my partners Craig Margolis --

THE COURT: Good morning.

MR. FAUST: -- and Sharon Stagg who is an in-house --

THE COURT: Good morning.

MR. FAUST: -- counsel at KBR.

THE COURT: Okay.

MR. FAUST: Your Honor, if I could trouble you for a moment, we have one attorney admission.

THE COURT: Okay. I'd be glad to take it.

MS. LOLLAR: Good morning, Your Honor. I would like to move the admission of Kate Codd. She's a member in good standing of the Virginia Bar. She's a lawyer with our law firm of Vinson and Elkins.

THE COURT: I would be glad to grant your motion, [4] Ms. Lollar, upon her taking the oath and being registered by the clerk.

You want to come to the podium, please.

(THE OATH WAS ADMINISTERED TO MS. CODD.)

THE COURT: The Court is pleased to admit you on Ms. Lollar's motion. Thank you. And there's some forms I would like you to sign downstairs when you complete this hearing.

Okay. Thank you.

MS. CODD: Thank you, Your Honor.

THE COURT: Okay. I'll take the motion to seal, and I'll -- Mr. Holmes for Mr. Carter.

MR. HOLMES: Thank you, Your Honor. Good morning.

Your Honor that is Relator's motion. Attached

to Relator's opposition to the defendants' motion to dismiss were several documents that had been designated confidential by one or the other of the parties in the case. So pursuant to the terms of the protective order and the 08-CV-1162 matter, Relator has moved to seal those documents.

We do want to clarify for the Court that Relator's motion as far as the time period of the seal is not proposed by Relator that the documents be sealed indefinitely. We would intend, Your Honor, for the trial of this case to be conducted in open court. And so speaking specifically to Exhibit J, which is a document that the defendants spoke to in their response to our motion, it's Relator's position that that [5] document does not meet the standard, certainly not for indefinite sealing because that is a document in which -- which reflects that 11 witnesses, employees of the defendants, reported to a non-attorney of the defendants, a human resources employee named Terrence Copling (phonetic). That defendants' supervisors and their managerial personnel had directed defendants' employees to bill the United States for time spent not working.

And thus, in that regard, Your Honor, we do not believe it meets the sealing standards. It is certainly an incriminating document, but we do not believe that that document should be shielded from the public, for example, at trial.

I think -- just a last quick item to raise for Your Honor. There's an item that I think the defendants may present to Your Honor for potentially as a housekeeping issue which is something that they

raised in the last two pages of their response.

THE COURT: Let me ask you this. Why is the public's right of access outweighed by your client's competing interest?

MR. HOLMES: Your Honor, it's an interesting posture for this motion in that many of these documents were actually designated by the defendants as confidential, and thus it's been practice in the case to this point for the parties to respect those designations and to file this type of motion as a [6] preemptive measure, as a prophylactic measure to prevent the docu-ments from just immediately entering the open record, potentially being picked up by the media.

You know, I would speak again to that Exhibit J. It's Relator's position that that document frankly does not meet all the standards. It's just that it was designated as subject to the confidentiality order in the 08-CV-1162 matter, which has now been dismissed. So there is some unique aspects there in that the protective order in that case required that the parties come to the Court to contest confidentiality designations. So thus, Your Honor, our position is that the documents should be sealed provisionally but not indefinitely.

And I think, just the last point, is that the defendants had mentioned in the last two pages of their response an intention to file certain documents designated by Relator in the 08-CV-1162 matter in the open docket as soon -- as soon as today or Monday. We've written a letter to the defendants explaining our position that we do not believe that is appropri-

ate. There's not a motion pending before the Court on that issue. And to the extent the defendants present a motion on that issue, we would respond to it.

So thank you, Your Honor.

THE COURT: Very well.

Ms. Lollar.

MS. LOLLAR: Your Honor, I'm a little bit confused [7] about what he's saying about Exhibit J because it's the subject of their motion to seal. We filed our response just simply to lay out some reasons that we think that the public interest assumption to right of access for that document is outweighed by KBR's sig-nificant interest in keeping documents like that under seal. It's a -- it's a record of an internal employee relations investigation. KBR tries to keep these doc-uments confidential. It marks them as confidential at the time they're created, produced it as confidential under the protective order, and has an interest, of course, and, you know, encouraging its employees to speak freely with investigators.

Mr. Holmes raises questions about whether documents should be sealed if there's a trial. We'll deal with that when there's a trial, if there is a trial.

And as far as what he's saying about our practice in the 08-1162 action, our practice was to give each other notice ahead of time that we were filing documents that the other party had designated as confidential so that the designating party could move to seal them if they so chose. That's what we did when we attached documents that Mr. Carter desig-

nated as confidential to our briefs. He's not moved to seal those, and so it seems that absent his motion to seal them, that maybe they should be filed publicly.

We don't object to sealing any of them. It's just, [8] you know, we filed this specific response, you know, specifically on exhibit -- Exhibit J because we feel that it really does overcome the public -- the presumption of public right of access to it.

THE COURT: Okay.

Mr. Faust.

MR. HOLMES: One quick point, Your Honor, just related to that.

When Ms. Lollar mentioned the practice in the 08-CV-1162 matter, there is a protective order in that case. It's Relator's position that the language of that protective order governs. So even if there was a one off introduction of a given document in that case that Relator consented to, Relator has not consented to the introduction into the public docket of the documents at issue that the defendants propose to introduce into the public docket as soon as today.

So, we do continue to hope that they'll file a motion consistent with the language of the protective order if they intend to do that.

THE COURT: All right, sir. Okay. I'll take it under advisement.

Let me go to the heavier part of this case, the defendants' motion to dismiss.

Mr. Faust.

MR. FAUST: Yes, Your Honor, I'll argue that one.

[9] That motion involves two jurisdictional chal-lenges, Your Honor. One of them, the first-to-file bar, you've written on extensively already --

THE COURT: This case was filed in August, correct, while the -- while the appeal was pending?

MR. FAUST: Yes.

THE COURT: And then there was a motion to dismiss the appeal in December, then it was actually granted in February --

MR. FAUST: Correct.

THE COURT: -- by the Fourth Circuit.

MR. FAUST: That is correct.

THE COURT: Okay.

MR. FAUST: And there is an interesting issue associated with that because, of course, Mr. Carter filed this -- the complaint in the matter that we're here on today at a time when his prior complaint was pending on appeal. And by his own definition of how to apply the first-to-file bar, we're here on a case that's barred.

But there's -- there's still the *Thorpe* case that Your Honor already dealt with in the California matter that we have to address and the continuing -- con-

tinued barring --

THE COURT: Well, the California case got dismissed because the -- they were told to get -- the attorneys withdrew. They were told to get new attorneys within 60 days. They didn't do it, so that was dismissed.

[10] MR. FAUST: Correct.

THE COURT: And that has not been brought back as far as you know?

MR. FAUST: No, it has not.

THE COURT: All right. Go ahead.

MR. FAUST: The position that the Relator takes is, Well, look, I filed a complaint in August of 2010. By that time *Thorpe* had been dismissed, so there's no first-to-file bar and I can go forward.

That -- it's true that he filed a complaint in August of 2010, but that, as he admits, is the exact same complaint that he filed in the 08-1162 matter in January of 2009 at a time when *Thorpe* was still pending. Not only it's the exact same complaint right down to its typographical errors, to the causes of action that this Court already struck in the prior complaint. He wants to use the same discovery record from that past case. We're arguing today about the protective order from that last case, and he tells you that the orders that Your Honor issued in that other case are fully applicable to this case.

It is -- you know, Carter may have filed a com-

plaint in August of 2010, but he brought this action in January of 2009. And that's what the statutes speaks to: When did you bring the action.

This action, this cause of action and these [11] allegations were brought to this Court in January of 2009 when *Thorpe* was pending.

Now, he's asking the Court to be the first one anywhere to hold that a case can be dismissed because of a prior related action and then reinstated, the same exact case just under a new number if the prior case is dismissed.

There's no case that holds that.

I know about *Chovanec* and that issue in the Seventh Circuit, and that issue was not before the Court then. There was no question then in that case as there is here of whether when you refile the same case that case counts as a new action for first-to-file issues.

That question simply was not before the Court. There was no complaint proffered for the Court. And what the Court actually said there was the Relator can file a new complaint.

And then the Court said, In that new complaint, she might be able to frame her allegations in such a way that she avoids the first-to-file bar and res judicata. Well, Mr. Carter didn't do that. He filed the exact same complaint.

The only case that we know of where a Relator tried to file the same complaint, he did it in the form

of an amended complaint and it happened in the *Branch* case in the Eastern District of Louisiana in January of this year.

And the *Branch* Court said, No. That's the same [12] action. You're still barred. And the fact that in the interim before the amended complaint was filed that the first filed action was no longer pending doesn't make any difference.

And that's consistent with a whole set of cases that we've cited to you. It's in Footnote 15 of our opening brief. All these cases that have held that changes in the status of the prior pending action don't give rise to any reinstatement right for the later filed --

THE COURT: Okay. If you prevail in this, you want this dismissed with prejudice. You want to tell me why?

MR. FAUST: This case, it has been -- this is -- we've identified our first-to-file issue that cannot be cured. The same -- if he continues to file this same complaint, it's the same action.

There are no other allegations here to be considered. He's already pled this case several times, and it's been the subject of at least three different motions --

THE COURT: Had some counts dismissed as well or --

MR. FAUST: He did. He did. They appear again in this complaint that he filed in August. But

we've been through this for a number of years, in a couple of different courts, and several rounds of motions to dismiss.

He hasn't asked for leave to replead. He cannot replead. These are his allegations. At long last, this is his complaint.

[13] THE COURT: He's never had a hearing on the merits, though. I mean, there's never been any merits.

MR. FAUST: There's been -- well, there were motions to dismiss, 12(b)(6) --

THE COURT: Right.

MR. FAUST: -- motions on the adequacy of his allegations. We have not gotten to summary judgment, and we have not gotten to trial. That is true.

THE COURT: Okay.

MR. FAUST: But this -- this problem cannot be cured. He has not asked to refile. He's just saying that he can -- he can proceed on this same action.

We've been through this, Your Honor. There's no -- there's no point at this point in allowing him to replead, and he hasn't asked to do so.

THE COURT: Okay.

MR. FAUST: I would say -- you know, one way to look at this, even the *Chovanec* case says you can't simply stay a case to await developments in the prior

pending action then reinstate it if something happens in that prior case. And, you know, Your Honor denied the stay relief last year when Mr. Carter asked for it.

But what he did in this case was actually grant himself a stay. He took a kind of a protective appeal from Your Honor's prior first-to-file issue ruling. And then when [14] *Thorpe* was dismissed, he filed this other complaint that we're here on today in this court in Au-gust of 2010, then eventually dismissed his appeal.

He -- you know, in a formal sense, he filed a complaint in August of 2010, but what he really did was just lift his own stay and proceed, start back up with this case as if he had never -- he never left off.

You know, this is in our brief, and I won't belabor it. But this Court in *Ericsson* and the Fourth Circuit in the *Webster* case have said, Look, this is a simple first-to-file bar. It establishes a race to the courthouse. And the reason we put it that way is that this --

THE COURT: Excuse me. Go ahead.

MR. FAUST: I beg your pardon.

The first Relator to give the Government notice of potential fraud against the Government by filing a lawsuit is, according to the Fourth Circuit, the only one that gets to proceed and take a share of the Government's recovery if there is any one.

Mr. Carter is asking you to apply the rule in a much different way, so where the loser of the so-

called race to the courthouse never really loses. He can always just proceed, again, with the same action, if and when the first case ceases to be pending.

And, Your Honor, one aspect of this of applying the [15] rule in that way is that other cases can get filed in the interim that may have their own barring effect. And, you know, to be frank, we suspect that there are other timekeeping cases out there that were filed be-fore Mr. Carter's August 2010 complaint, and have actually asked the Government to confirm whether that is the case, the same way they con-firmed the ex-istence of the *Thorpe* --

THE COURT: Well, they came up and told you -- told us about the California case two weeks before the trial date in this case.

MR. FAUST: They did.

THE COURT: Yeah.

MR. FAUST: And we've asked them. We said, We don't really want to go through that again. If you have -- if there are other timecard related qui tams out there, please tell us or at least tell the Court and submit them in camera to the Court if you're con-cerned about the seal so that at least the Court knows whether there's some other related action out there --

THE COURT: And so far they haven't done anything? MR. FAUST: They have not.

THE COURT: You've got an answer one way or the other that --

MR. FAUST: I have not. I placed a phone call on Monday afternoon. Had a discussion with Mr. Jones of the [16] Justice Department. I'm not -- he's not here today. I thought he might be. And then we followed it up with a letter. And I don't -- I don't have a response.

And, you know, that may -- I'm only flagging it, Your Honor. I don't know if we have an issue. I think we probably do, but I don't -- I don't know it.

If we do, we may come back to you and ask that -- that the Government be compelled to at least tell the Court whether there's something else out there because this -- this shouldn't happen again. It happened in *Thorpe*, and it was a waste of a lot of resources on the Court's part and ours in a case that was, as you say, approaching dispositive motions and trial.

Let me spend just a moment on Relator's other first-to-file argument.

You know, I think it's -- I think the Relator realizes that he has a problem because this really is the same action, so he shifts tact a little bit and now argues that *Thorpe* was never really pending because he thinks it doesn't satisfy Rule 9(b).

Well, Your Honor, you address --

THE COURT: Well, yeah, but I declined to rule on 9(b) to get in the California action.

MR. FAUST: Yes.

THE COURT: Yeah, I declined the invitation. Yeah.

[17] MR. FAUST: You did, but you also -- you also said the statute -- on a plain meaning basis, the stat-ute says pending. Pending means the case is filed. It's there on the docket. It's not subject to any qualifica-tion or exception to the first-to-file rule under Rule 9(b). The Court simply refused to file -- to follow the line of cases, the *Walburn* case that the Relator cited to you.

You know, the Relator could have appealed that. He did initially appeal that ruling and then abandon the appeal.

THE COURT: Well, they wanted an advisory opinion before they appealed.

MR. FAUST: I'm sorry, Your Honor?

THE COURT: They wanted an advisory opinion before they appealed.

MR. FAUST: That -- that is also true.

And if I can, Your Honor, just briefly shift to the second jurisdictional argument we make, which is the public disclosure bar. And I think, I hope, that I can simplify this a little bit.

There are a lot of qualifying public disclosures here. Mr. May in his Senate testimony, his conversations with the media including the Halliburton watch outfit with Government officials, including people at the Department of Defense, people at the Army about

his timecard allegations, the same timecard allegations that are at issue here he told me in [18] his deposition.

But I think we can cut through that to something that's even simpler, which is this: Carter's most obvious public disclosure of our problem is presented by his own complaint in the 08-1162 matter. That is plainly a public disclosure because we were all litigat-ing that complaint here last year.

His current case is plainly based on that prior complaint no matter what standards you want to apply. In fact, it's a copy of that complaint, as he admits. So you've got a public disclosure bar triggered here that puts the burden on Mr. Carter to demonstrate that he's an original source. And the evidence on that is this --

THE COURT: The question is whether Mr. May was the original source or whether Mr. Carter.

MR. FAUST: It is. And our evidence on it is it's quite -- quite an unusual documentary record. I've never seen anything like this in a public disclosure context, the clarity of it.

When Mr. Carter and Mr. May were brainstorming a possible *qui tam* against KBR, Carter had no timekeeping timecard allegations to contribute to that effort. Those all came from Ken May, and we know that because the document, which is Exhibit 6 to our opening brief, is color coded: Blue for Mr. Carter; green for Mr. May. The green stuff relates to [19] timecard fraud. The blue stuff, appropriately, all seems to relate to water and some other -- and some

other allegations that aren't -- that aren't at issue here.

And it only makes sense. When we deposed Mr. May, he told us, Yes, I was in the administrative office. I saw everybody's timecards. I'm the one who was talking about, you know, so-called systemic timecard fraud at the base where

Mr. Carter and Mr. May worked together.

When the two of these fellows, May and Carter, went to a Senate hearing together, May is the one who talked about timecard fraud. Carter never mentioned it.

When Carter sued out in California, he dropped Ken May, and his initial complaint, as Your Honor may recall because you dismissed it, said nothing about timecards.

Nothing about timecards came into this case until the second amended complaint in that last case after Your Honor dismissed the first thing.

And one other thing, Your Honor, an original source has to prove to be an original source that he made a voluntary disclosure to the Government before suing; you know, conveying these allegations. Well, we know Mr. May did that because he was talking to these Army officials and senators and Department of Defense officials, but there's no evidence in this record that Mr. Carter did that, that he went to the Government and disclosed these allegations or that he -- certainly that he [20] didn't do -- that he did it before Mr. May.

Now, you know, Carter says that he's able to offer some details of his own about timekeeping fraud, and he did have his own experience. I don't want to discount that. But it is Ken May who was the one who contributed these systemic timecard fraud allegations to this -- to this whole situation.

Mr. Carter is essentially coming along after that and saying, Me too. What Ken May described, Well, I falsified my timecards too, as he's admitted to doing. That adds -- that adds nothing of significance to Ken May's account. And on those grounds, Your Honor, we think Mr. Carter is not an original source, and he's jurisdictionally barred under the public disclosure bar as well as the first-to-file bar.

THE COURT: All right, sir.

MR. FAUST: Thank you, Your Honor.

THE COURT: Mr. Faust [sic].

MR. HOLMES: Thank you, Your Honor. Cliff Holmes on behalf of Mr. Carter.

Your Honor, the only way the defendants win on this first-to-file argument is if we deign to add language to the statute. The language in the statute is very clear, and it states that no action may be brought based on the facts of a filed action of the same facts underlying the pending action.

There is now no pending action in any district court --

[21] THE COURT: Well, but they had a pend-

ing action when you filed the August -- you filed this in August, this case in August --

MR. HOLMES: Right.

THE COURT: -- and you had -- the other case was on appeal through the Fourth Circuit. Correct?

MR. HOLMES: Your Honor, let me address that point.

Mr. Carter's 08 -- the dismissal of Mr. Carter's 08-CV-1162 action had been noted for appeal to the Fourth Circuit at that time. That's correct, Your Honor. However, the statute is very clear. It's 31 U.S.C. 3732 (a) that under the False Claims Act jurisdiction is vested in the district courts. There is no pending action in any district court in this country that the defendants can identify. And Mr. Carter's action --

THE COURT: Well, the California case was gone.

MR. HOLMES: Correct, Your Honor.

THE COURT: Yeah.

MR. HOLMES: Okay. The -- this Court had dismissed Mr. Carter's 08-CV-1162 action. If one were to log on to Pacer, the electronic docketing system, the message one saw is case closed. The action was not pending. It was dismissed. And in fact, it is hornbook case law under the 1982 *Griggs* U.S. Supreme Court decision that, quote, the filing of a notice of an appeal is an event of jurisdictional significance.

It [22] confers jurisdiction on the Court of Appeals.

And there was no district court jurisdiction over that 08-CV-1162 matter as Your Honor recognized in part in declining to offer any ruling on the motion for clarification. And as Your Honor noted, that would be an advisory ruling.

So that argument by the defense is a red herring. We again -- we need to note what was pending at the time the defendants filed their motion to dismiss in this action. There was no other case pending in any district court.

THE COURT: You-all discuss the California case a lot, but then the question to me is whether or not the Fourth Circuit case was pending when you filed this case. And I think that's the issue. And you agree that this is a mirror of your previous case that you filed in this court. Is that correct?

MR. HOLMES: Your Honor, the complaint filed in this action is an identical copy of the second amended complaint in the 08-CV-1162 action. However, as Judge Easterbrook noted in the *Chovanec* decision in the Seventh Circuit, one files an action by -- one commences an action by filing suit.

When Relator, Mr. Carter, noted his appeal of the dismissal of the 08-CV-1162 action, he did not file a new suit. He did not do anything to confer a new jurisdiction under any district court, any jurisdiction over this action. In fact, as Your Honor had already done, the case had been dismissed.

So, the pendency of an appeal in that Fourth

[23] Circuit did nothing to revive or resuscitate jurisdic-tion, and that Your Honor had already ruled that the action was dismissed.

THE COURT: Okay. What about the public disclosure?

MR. HOLMES: And, Your Honor, if I may just address one or two additional points --

THE COURT: Go ahead.

MR. HOLMES: We do refer Your Honor to the *Chovanec* decision which we believe is very well reasoned. Also with respect to the Branch Consultants district court case noted by the defendants, that case was decided in January of this year. What the Court stated there -- and this is very important to note because that Court followed precisely the reasoning and the logic of *Chovanec*.

And what the Court stated was, quote, the use of the term action in both provisions, referring to the False Claims Act, indicates that this Court should look to the jurisdictional facts that existed at the time the action was filed as opposed to the facts that existed when the Relator filed an amended complaint, end quote.

And so what that tells us is that at -- again, look -- look to August 4, 2010. Was there any action pending in any district court, and the answer is clearly no.

We do, Your Honor, want to address two of the Fourth Circuit decisions cited by the defendants in

their [24] first-to-file argument. Those are the *LaCorte* and *Webster* decisions. *Webster* was an unpublished case. It did not present the same issues that are presented here, a dismissed action and the ability for Relator to file a new complaint. That instead involved a question of Relator's ability to intervene in a pending action.

It was a different question presented. The Court never reached the issue before this Court today. And in fact, what the *Webster* court said -- this was a per curiam opinion -- was, quote, the statute requires a *qui tam* plaintiff to make some effort to prosecute her suit in order to participate in any ultimate recovery, end quote.

The Court also said, quote, the careful balance struck by Congress would be flown awry if individuals could stockpile potential *qui tam* claims while waiting for more diligent plaintiffs to bring the case in earnest, end quote.

And that's *Thorpe*. They speak right there to *Thorpe* who's never able to retain new counsel to prosecute the case to even serve it under the defendants. So as Your Honor noted before, no merits determination in *Thorpe*, no settlement, no 9(b) determination. And as I think Your Honor may have suggested in your question to Mr. Faust a few minutes ago, there is now no prudential bar to Your Honor reaching the 9(b) issues presented by *Thorpe*. Does that complaint even satisfy 9(b) as to billing allegations? Does it satisfy it as to facts [25] in Ar Ramadi or Al Asad where Mr. Carter served? No, it does not. It does not even mention those -- those bases.

So, Your Honor, to emphasize the 9(b) determination, that is a ground Your Honor could reach in the alternative to just engaging in a very straightforward plain reading of the statute which uses the term pending action and to weigh that against whether there was any pending action at the time of the filing of the suit.

That is on the first-to-file issue, Your Honor. If Your Honor wishes I can now address the public disclosure argument.

THE COURT: Go ahead. Let me hear you on public disclosure.

MR. HOLMES: Your Honor, this is a Hail Mary pass by a football team pinned down at the 20-yard line with a complaint that's been held to satisfy 9(b) and a massive evidence against them. There's no question they committed fraud. The docs -- some of the documents that we submitted attached to our opposition confirm that conclusively.

We think that what -- what the defendants have done here, Your Honor, is nominate a straw man in the form of

Mr. May. This is an individual who spoke three words at a Senate hearing, and the defendants would somehow connect that to this 200 paragraph complaint. And what we want to emphasize for Your Honor is we've waited for it.

[26] We've read the defendants opening brief. We've heard the arguments today. We've never heard the defendants identify a single paragraph in Mr.

Carter's complaint that they believe was actually derived from the May Senate testimony. Not a single -- single paragraph.

So if we don't have a single paragraph that was actually derived from that -- those two words spoken in a Senate hearing, how can the entire complaint be based upon anything that Ken May said at that juncture?

What we believe Your Honor will find as you continue to look at this issue is that the defendants are boxed in under -- the acronym for the new law, as Your Honor would have noted from the briefs, is PPACA, an updated law filed -- passed by Congress in 2010 that changed some of the language surrounding public disclosures under the statute.

In the pre-PPACA, the standard is that in order for a complaint to be deemed based upon a public disclosure the allegations at issue must be actually derived from the asserted public disclosure. Actually derived. They cannot link up the Carter allegations to the two-word statement by Mr. May, in part because we've already deposed Ken May.

And we've asked him at deposition, Were you ever instructed by anyone to commit timesheet fraud?

And he said, No. He said, I have no awareness of those instructions. If those were given, they were given to [27] someone else.

He has in fact admitted that he's entirely dependent on Mr. Carter for the substance of any timesheet fraud allegations. Not only is Mr. Carter the

source -- the original source of the allegations in his complaint, he is the original source for May's two-word statement at the Senate hearing.

What we want to offer to Your Honor in that now the defendants have raised in a footnote -- a couple of these arguments you'll note they've only raised in footnotes in the reply briefs. It's a sign of the weakness of the arguments. Also under Fourth Circuit precedent 2008, the *Mosley* decision, they've waived those arguments because they only raised them in their reply. And that includes this notion that there could be some bar stemming from the Fourth Circuit appeal and also extends to this notion that there's a public disclosure with the 08-CV-1162 complaint, because they never raised that in their opening brief.

But in any event, because what the pre-PPACA statute says is that you must find an actually derived linkage between the allegations in the complaint and the original statement. You can't find that because Mr. Car -- we've gone through e-mails with Mr. May. We've said, you have here this e-mail dated October 5th, 2005, from Mr. Carter to Mr. May.

Mr. Carter outlines there very specifically the [28] same allegations contained in Paragraph 68 of his complaint that he was told to spend his Sundays not working, to spend them cleaning and staying inside playing softball. And Mr. May was asked about those allegations at deposition if he had any knowledge of those allegations, and he said no. He said he was en-tirely dependent on them from Mr.

Carter. We've cited to that transcript testimony in our opposition brief.

What we need to emphasize for Your Honor is that, again, you have May as a straw man. You have 11 witnesses who have come forward and confirmed Terrence Copling (phonetic) who is the defendants' human resources individual who went to Ramadi, who compiled a report, and all 11 said timesheet fraud was being committed.

It's no surprise that witnesses crop up such as Mr. May. What is surprising is that the defendants would seek to elevate him who -- he's an administrative assistant ahead of Mr. Carter who is the ROWPU employee. Mr. Carter was the one in the field who knew that the defendants were not doing any ROWPU work. Mr. Carter was the one who was able to confirm that because the defendants were not doing any work, the water being received in their non-public water supplies was in fact contaminated.

In short, Your Honor, even if you were to credit the two words timecard fraud at that Senate hearing which is akin to yelling fire in a crowded theater as a cognizable [29] public disclosure and leap over the requirement that that two-word statement needs to be linked to the exceedingly specific fact of Mr. Carter's complaint over which Mr. May stipulates he has no independent knowledge, there's no question that Mr. Carter has knowledge that his first independent of May and second materially adds to the publicly disclosed information. We know that in part again from the deposition testimony.

Mr. Carter was asked, What happened at Al Asad? How were you instructed about timesheets at Al Asad?

He said, A man named David Stollard (phonetic) told me to fill out my timesheets, saying 12 hours a day every day regardless if I had worked. He said, I didn't want to do that, but I was told I would lose my job if I did that.

So his first timesheet entry -- and you see this in the actual timesheet -- says eight hours; second day, eight hours. Third day the scheme takes over and it starts saying 12. And that is what you see for the other ROWPU personnel in this case. We did not want to burden Your Honor by stacking 300 pages of timesheets and producing them into chambers. You see it's 12 every single day for every ROWPU employee, precisely consistent with the scheme stated in the complaint.

Defendants, again, Your Honor, have raised a couple of new arguments here for the first time today. They've -- they've made an allegation that -- you know, that the Fourth [30] Circuit appeal could constitute a type of pend-ing action. For reasons stated, that is not a valid the-ory. The defense have sprinkled their brief with a handful of character assassination statements against Mister --

THE COURT: I mean, if you let the Fourth Circuit case go to fruition and not dismissed it, it could have decided that -- decided the issues in this case that were pending on appeal before you ever had the trial. Correct?

MR. HOLMES: Your Honor, but we did not do that. That -- that is something -- the dismissal of that appeal was something always within Relator's control. And given that he has dismissed it, there is no pending action at the time that Mr. Faust filed his motion to dismiss.

Again, the question is whether there was a pending action at the district court level. Had it gone to fruition, you're correct. The --

THE COURT: You mean pending action as being at the district court level?

MR. HOLMES: That is correct, Your Honor.

THE COURT: And not as the appeal level?

MR. HOLMES: That is correct, Your Honor. That is -- that again flows from the statute. Section 3732 A says, There shall be jurisdiction under this statute in the district courts of the United States. It does not specify any jurisdiction in the courts of appeals.

[31] There is no way the Fourth Circuit could have resolved a merits issue in this case. There is no way that any recovery could have resulted from anything the Fourth Circuit was set -- could -- decided on that briefing.

THE COURT: Okay.

MR. HOLMES: Let me also tell Your Honor that the defendants in the briefing before the Fourth Circuit laid before the Fourth Circuit the same ar-

guments that they present now. They cited the same case law. A three-judge panel that included Judge Wilkinson came down at the two-sentence decision the decline to bite on those arguments, and they granted Relator's motion to dismiss. I do believe that the briefing in that regard is very instructive --

THE COURT: Well, the Fourth Circuit didn't rule on any of the merits of the arguments, did they?

MR. HOLMES: They did not, Your Honor. However, they were presented to the Fourth Circuit for the taking. Had --had they ruled in the defendants' favor, they would have had to adopt those arguments stating --

THE COURT: Okay. All right.

MR. HOLMES: Your Honor, I just do want to speak to, again, what I would characterize as certain sprinkled statements of character assassination against Mr. Carter the defendants raise in their briefing. This includes the statement in the last sentence of the third to last paragraph [32] of the brief an allegation Mr. Carter denies. I would strongly urge Your Honor to ignore that -- those type of ad hominem attacks in deciding on the important issues presented by defendants' motion.

THE COURT: Very well.

MR. HOLMES: Thank you, Your Honor.

THE COURT: Mr. Faust?

MR. FAUST: Yes, Your Honor.

THE COURT: The Relator reads that statute as being pending in the district court.

MR. FAUST: He does? First time I've heard that. And I think he started the argument by saying that we were adding words to the statute. I think that's just what Mr. Holmes just did. Pending means pending.

The case was filed in this court. He appealed the -- Your Honor's ruling. The case was pending in the Court of Appeals. It could have come back to Your Honor. The case was a live case. Somebody visiting the website -- the Pacer website here would see that the case was closed. And if it looked at the docket would see that there was a notice of appeal filed. Look at the Court of Appeals and see that there was an appeal pending. It's a pending case. And there's no -- there's no gloss in the statute on pending. Pending means a pending case. Your Honor has already ruled that in the context of the *Thorpe* case that pending just means pending.

[33] And with respect to this assertion that we have not made the argument that Your Honor is focused on, Page 16, Footnote 18 of our opening brief lays it out. If he's going to file -- if he's going to apply the first-to-file bar here and kind of ignore the continuing barring impact of *Thorpe*, he's got to address the barring impact of his own pending case. We didn't sneak up on him with that argument.

Just to hit the *Branch* case for a moment, Your Honor. One of the critical things in that case that we bring to the Court's attention in our opening brief is

that that Court, as we do, reads the term "action" as used in the statute to refer to the -- the allegations that are the cause of action that the Relator brings, not to refer specifically to different versions of his complaint.

And that supports our argument here with respect to *Thorpe* because all he has offered is another complaint. In fact, the exact same complaint under a new number. It's not a new action. It's the same action. To say otherwise is just --

THE COURT: Well, he admits it's a fair complaint.

MR. FAUST: He does. He does. I won't belabor it, but I wanted to bring the *Branch* Court's attention to you because there's some authority for what we're talking about here.

With respect to -- with respect to the public disclosure bar allegations, there's a -- the assertion is that [34] we have not shown that Mr. May anticipated particular paragraphs in the complaint that Mr. Carter has offered. It's not the way the analysis works, as Your Honor has seen in the first-to-file context.

The core allegation underlying this entire lawsuit is the submission, the systemic submission of falsified timecards. That is the -- that's the gist of this cause of action, and May did anticipate that. I conceded at -- and when I first stood up that Carter has his own sort of me too allegations in his complaint, but the core allegation is submission of false timecards and Mr. May was the first to raise that.

There is a -- there is a red herring argument, too, in the public disclosure arguments that Mr. Holmes has presented to you that I tried to take off the table when I first stood up, which is it is not just the Senate hearing where Mr. May mentioned the timecard fraud. Although that's a pretty -- as Mr. Holmes says, that's a pretty explosive setting. To say timecard fraud in a room full of senators is a pretty significant disclosure that would at least put the Government on notice that it had something to look into. May talked to a lot of other people about this too.

But the point is, as I said, the key public disclosure that you can look at here is Mr. Carter's own complaint in the prior action. There's no question that's a [35] public disclosure, and there's no question he's even admitted that he copied every one of the allega-tions from that complaint to file the complaint that he did here. The only question is original source at this point, and that, Your Honor, has the evidence on -- on that on Mr. Carter --

THE COURT: Very well.

MR. FAUST: -- versus Mr. May.

THE COURT: Okay.

MR. FAUST: Thank you, Your Honor.

MR. HOLMES: Can I just briefly address the last point that --

MR. FAUST: Your Honor --

MR. HOLMES: -- if Your Honor having the evidence.

THE COURT: All right. I'll let you make one comment, and then I'll let Mr. Faust come back since it's his client's motion.

MR. HOLMES: Certainly, Your Honor. Yes.

What Mr. Faust stated was you have the evidence as to Mr. Carter's status as original source. Specific to that, the defendants handed up to Your Honor the 368-page transcript of Mr. Carter's deposition at a hearing in the 08-CV-1162 matter.

We did not want to burden the Court with a resubmitted filing of 400 pages into chambers unless -- unless Your Honor and your clerks had ready -- presuming, Your Honor, [36] your clerks had ready access. We do offer to resubmit that transcript, the entirety of which does demonstrate conclusively Mr. Carter's status as original source. So we would offer to the Court --

THE COURT: All right, sir.

MR. HOLMES: We can do that by --

THE COURT: All right. I understand.

Mr. Faust, any other comment?

MR. FAUST: Nothing further, Your Honor. You can obviously look at -- ask us for whatever additional material you would like, but that -- that does constitute some new argument from Mr. Holmes. It's

not referenced in his brief.

THE COURT: Okay. I'll take it under advisement and let you-all know.

Thank you. You-all have a good weekend.

THE LAW CLERK: All rise.

(PROCEEDINGS CONCLUDED AT 10:46 A.M.)

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES *ex rel.*, BENJAMIN CARTER,	:	
Plaintiff,	:	
v.	:	1:10cv864 (JCC/TCB)
HALLIBURTON *et al.*,	:	
Defendant.	:	

MEMORANDUM OPINION

JAMES C. CACHERIS, District Judge.

This matter is before the Court on Relator Benjamin Carter's ("Carter" or "Relator") Motion to Seal ("Mot."). [Dkt. 37.] For the following reasons, the Court will grant the Motion to Seal only as to Exhibit J and as to the portions of Relator's Opposition that address Exhibit J and will deny the Motion to Seal as to all other exhibits.

I. Background

A. Factual Background

Relator moved to seal the unredacted copy of his opposition, [Dkt. 36] (the "Opposition"), to Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.'s (collectively, "Defendants") motion to dismiss, and exhibits C through J thereto, [Dkts. 36–3 to–10]. (Mot. at 1.)

Defendants filed a response. [Dkt. 40 ("Resp.").] Defendants do not object to Carter's Motion to seal, but "submit [their] response to explain why Exhibit J meets the sealing standards applied in this Court." (Resp. at 1.)

This case is substantively identical to an earlier case Carter filed in this Court, 1:08cv1162 ("Carter 2008"), which the Court dismissed in May of 2010, as more fully set forth in this Court's Memorandum Opinion regarding Defendants' motion to dismiss. In Carter 2008, the parties agreed to a Stipulated Protective Order Regarding Disclosure of Confidential Information (the "Protective Order"), which was entered by Magistrate Judge Anderson on October 23, 2009. (1:08cv1162 [Dkt. 149].) The Court notes that though this is informative, this case is *not* Carter 2008, and a review of the docket in *this* case shows there is no entered protective order.

Carter asserts that his Opposition "references material designated as 'Confidential' pursuant to the parties' October 23, 2009 Protective Order in [Carter 2008]." (Mot. at 1.)

B. Procedural Background

Carter filed his Motion to Seal on May 2, 2011. [Dkt. 37.] Defendants filed a Response on May 10, 2011. [Dkt. 40.]

Carter's Motion to Seal is before the Court.

II. Standard of Review

The common law presumes a right to inspect and copy judicial records and documents. *Stone v. Univ. of Md.*, 855 F.2d 178, 180 (4th Cir.1988) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)). The common law presumption of access may be overcome if competing interests outweigh the interest in access, and a court's denial of access is reviewable only for abuse of discretion. *Id.* Where the First Amendment guarantees access, however, access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest. *Id.*

The common law presumption in favor of access attaches to all judicial records and documents, whereas the First Amendment guarantee of access has been extended only to particular judicial records and documents, such as documents filed in connection with a summary judgment motion in a civil case and documents filed in connection with plea hearings and sentencing hearings in criminal case. *Id.* at 180–81 (internal quotation marks and citations omitted).

As to whether the common law presumption or the more-stringent First Amendment guarantee applies in the motion to dismiss context, this Court has previously applied the *common law presumption* of access to documents relevant to its consideration of a motion to dismiss. *GTSI Corp. v. Wildflower Int'l*,

Inc., No. 1:09cv123, 2009 WL 1248114, at *8–9 (E.D.Va. Apr.30, 2009). The Fourth Circuit, in an unpublished decision, has addressed this issue, stating that "the First Amendment guarantee of access should not be extended to documents filed in connection with a motion to dismiss." *In re Policy Mgmt. Sys. Corp.*, No. 94–2254, 94–2341, 1995 WL 541623, at *4 (4th Cir. Sep.13, 1995). Judge O'Grady has recently addressed the issue, and stated that the "First Amendment right of access ... may not apply to documents filed with a motion to dismiss. This distinction is logical." *Am. Civil Liberties Union v. Holder*, 652 F.Supp.2d 654, 661 (E.D.Va.2009), aff'd, No. 90–2086, 2011 WL 1108252 (4th Cir. Mar. 28, 2011) (internal citations omitted).

Under well-established Fourth Circuit precedent, a district court has the authority to seal court documents only "if the public's right of access is outweighed by competing interests." See *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir.2000). Before granting a motion to seal any court document, a district court must follow a three-step process: (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object; (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting alternatives. *Id.*

Additionally, Local Rule 5(C) requires a party moving to seal to provide:

> (1) [a] non-confidential description of what is to be sealed; (2)[a] statement as to why sealing is necessary, and why another procedure will not suffice;

> (3)[r]eferences to governing case law; and (4)[u]nless permanent sealing is sought, a statement as to the period of time[9] the party seeks to have the matter maintained under seal and as to how the matter is to be handled upon unsealing.

Local Rule 5(C) also provides that the party moving to seal shall provide a proposed order, and "[t]he proposed order shall recite the findings required by governing case law to support the proposed sealing."

III. Analysis

As an initial matter, the Court notes that Carter's Motion to seal does not satisfy Local Rule 5. Moreover, Carter's only argument in favor of sealing is that his Opposition "references material designated as 'Confidential' pursuant to the parties' October 23, 2009 Protective Order in [Carter 2008]." (Mot. at 1.)

Carter seeks to redact certain portions of his Opposition. (Mot. at 1.) Reviewing the redacted and unredacted versions of the Opposition, the Court finds that the redacted items are (1) portions of a June 11, 2010 hearing before this Court, (Opp. at 2); (2) a reference to a document entitled "Timekeeping Guidelines for KBR LOGCAP III In Theatre," (Opp. at 23); (3) a reference to Carter's deposition in Carter 2008, (Opp. at 24, 30); (4) a reference to Kenneth May's deposition in Carter 2008, (Opp. at 24, 26, 28–29); (5) references to Carter's first time sheet at Al Asad, (Opp. at 25); (6) references to an October 4, 2005 e-mail authored by Carter, (Opp. at 26); (7) references

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[9] At oral argument regarding the Motion to Seal, Carter represented that he was not seeking a permanent seal.

to Captain Laura Schroeder's deposition in Carter 2008, (Opp. at 27); and (8) references to a defendant Kellogg Brown & Root Services, Inc., Employee Relations Investigative Report, which is Exhibit J referenced below, (Opp. at 29–30).

Carter seeks to seal the following exhibits, with Defendants joining in arguing for sealing Exhibit J (and not opposing any of Carter's requested sealing):

- Exhibit C, Kenneth May's deposition in Carter 2008, (Opp.Ex. C);
- Exhibit D, a document entitled "Timekeeping Guidelines for KBR LOGCAP III In Theatre," (Opp.Ex.D);
- Exhibit E, Carter's deposition in Carter 2008, (Opp.Ex.E);
- Exhibit F, Carter's first time sheet at Al Asad, (Opp.Ex.F);
- Exhibit G, an October 4, 2005 e-mail authored by Carter, (Opp.Ex.G);
- Exhibit H, Captain Laura Schroeder's deposition in Carter 2008, (Opp.Ex.H);
- Exhibit I, the declaration of Harold Orr from Carter 2008, (Opp.Ex.I); and
- Exhibit J, a defendant Kellogg Brown & Root Services, Inc., Employee Relations Investigative Report, (Opp.Ex.J).

The Court will first address Exhibit J, and then address the remainder of the exhibits and the Opposition.

A. Exhibit J

Exhibit J is a report of an internal KBR Employee

Relations investigation. The Protective Order, from Carter 2008, governs the disclosure of "confidential information," which is defined to include "information the disclosure of which to or by the receiving party would, in the good faith belief of the producing party, result in the disclosure of ... information concerning ... *internal reviews, audits or investigations*." (Resp. Ex. 1 ¶ 2 (emphasis added).) Exhibit J thus qualifies as confidential information under the Protective Order.

More importantly, Defendants have shown that the right of access is outweighed by competing interests. *Ashcraft*, 218 F.3d at 302. First, the parties provided public notice of the request to seal that allowed interested parties a reasonable opportunity to object—nearly two weeks. (Motion to Seal filed May 2 [Dkt. 37].) Second, with respect to Exhibit J, there is no less drastic alternative to sealing the document, such as redaction, as the entirety of the document is confidential per the Protective Order. Third, the Court finds that Exhibit J contains confidential findings of an internal Employee Relations report that are normally unavailable to the public. The public's interest in access is outweighed here by the Defendants' interest in preserving confidentiality. There are no alternatives that appropriately serve these interests. Moreover, the Court notes that it did not consider Exhibit J in ruling on Defendants' motion to dismiss. The Court will seal this document.

B. Other Exhibits and the Unredacted Opposition

As to all the other sealing Carter requests, Carter has not provided any statement as to why the public's right of access is outweighed by competing interests. *Ashcraft*, 218 F.3d at 302. Carter's argument rests

solely on these materials having been designated as 'Confidential' pursuant to the parties' October 23, 2009 Protective Order in [Carter 2008]." (Mot. at 1.) This, alone, is insufficient.

The materials are Carter's, Kenneth May's, and Captain Laura Schroeder's depositions in Carter 2008, a document entitled "Timekeeping Guidelines for KBR LOGCAP III In Theatre" (which Defendant did not argue for sealing, as it did with Exhibit J), Carter's first timesheet at Al Asad, an October 4, 2005 e-mail authored by Carter, and the declaration of Harold Orr from Carter 2008.

Because Carter has not provided any reason as to why the public's right of access is outweighed by competing interests, *Ashcraft*, 218 F.3d at 302, the Court will deny the Motion to Seal as to these materials. Indeed, the Court asked Carter at oral argument if he could provide any reason as to why the public's right of access is outweighed by competing interests, and he provided none.

C. Defendants' Exhibits to its Motion to Dismiss

In their response to the Motion to Seal, Defendants indicated that they withheld from public filing a copy of exhibits 4 through 7 of their memorandum in support of their motion to dismiss, [Dkts. 31–4 through –7], and exhibit 9 to their response in support, [Dkt. 39–2], as well as the portions of Defendants' briefs that described those documents. (Resp. at 7.) Defendants represent that Carter had designated these exhibits confidential under the Protective Order. *Id.*

Defendants indicate that they intend to file those exhibits and unredacted copies of their briefs with the

Court's public filing system after the May 13, 2011 hearing on their motion to dismiss. *Id.* Carter did not reply stating he wants these documents sealed.

The documents are as follows:

- Exhibit 4, Kenneth May's deposition in Carter 2008, [Dkt. 31–4];
- Exhibit 5, an October 3, 2005 e-mail from Kenneth May to Carter, [Dkt. 31–5];
- Exhibit 6, a May 21, 2008 e-mail from Carter forwarding to himself a November 11, 2005, e-mail from Kenneth May to Carter, [Dkt. 31–6];
- Exhibit 7, Carter's deposition in Carter 2008, [Dkt. 31–7]; and
- Exhibit 9, Carter's deposition in Carter 2008, [Dkt. 39–2].

Carter has not provided any argument as to why the public's right of access is outweighed by competing interests. *Ashcraft*, 218 F.3d at 302. Accordingly, the Court will not seal these materials.

IV Conclusion

For these reasons, the Court will grant the Motion to Seal only as to Exhibit J and as to the portions of Carter's Opposition that address Exhibit J and will deny the Motion to Seal as to all other exhibits.

An appropriate Order will issue.

May 24, 2011
Alexandria, Virginia

/s/ James C. Cacheris

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES *ex rel.*,
BENJAMIN CARTER,

:
:

Plaintiff,

:

v. :

1:10cv864
(JCC/TCB)

HALLIBURTON *et al.*, :
:

Defendant.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendants Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc.'s Motion to Dismiss [30] is GRANTED;

(2) accordingly, Relator Benjamin Carter's

Complaint [1] is DISMISSED WITHOUT PREJUDICE; and

(3) the Clerk of the Court shall forward copies of this Order and accompanying Memorandum Opinion to all counsel of record.

May 24, 2011
Alexandria, Virginia

/s/

James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

UNITED STATES ex rel. BENJAMIN CARTER, Plaintiffs, v. HALLIBURTON CO., KELLOGG BROWN & ROOT SERVICES, INC., SERVICE EMPLOYEES INTERNATIONAL, INC., KBR, INC., Defendants.	*Filed under seal pursuant to* 31 U.S.C. § 3729, *et seq.* Civil Action No. 1:11-cv-602 JCC/JFA

COMPLAINT

1. This action stems from Defendants' fraudulent receipt of payments from the United States Govern-

ment under the LOGCAP III Contract ("LOGCAP" or "the Contract") for phantom labor and services which were never provided or performed.

2. The Defendants collected LOGCAP payments for the salaries of employees tasked to test and purify water distributed for use by U.S. troops at war in Iraq. Defendants' employees did not perform such services, which Defendants were required to supply under LOGCAP. Although the employees did not perform the services, and Defendants were aware that the employees were not performing such services, the Defendants falsely billed the Government for the cost of such employees' salaries and the performance of such services.

PARTIES

3. Relator Benjamin was employed by Defendants[1] in Iraq as a Reverse Osmosis Water Purification Unit (ROWPU) Operator. Prior to his employment by Defendants, Mr. Carter had twenty years of experience as a water purification specialist. For five of these years, Mr. Carter owned and operated his own water treatment company in Gunnison, Colorado. Mr.

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[1] Mr. Carter's nominal employer was Service Employees International, Inc.; Mr. Carter obtained his employment by responding to a job offer posted on the "KBRJOBS.com" website. Mr. Carter was trained by Halliburton personnel in Houston, Texas prior to departing for Iraq, as described in this Amended Complaint. Additionally, as also described in this Amended Complaint, "Halliburton/KBR" personnel treated Mr. Carter as an employee, and at other times pertinent to this Amended Complaint, as a former employee.

Carter brings this action on behalf of himself and on behalf of the United States.

4. Carter was hired in January 2005 as a Reverse Osmosis Water Purification Unit (ROWPU) Operator to work in Iraq on behalf of the Defendants. He was assigned to work in Iraq, in support of LOGCAP III, on January 13, 2005, and was assigned to Camp Ar Ramadi.

5. Defendant Halliburton Company ("Halliburton") is a publicly-traded company incorporated in Delaware. During much of the time at issue in this Second Amended Complaint, Defendant KBR, Inc. was a wholly-owned subsidiary of Halliburton. Halliburton's CEO has publicized Halliburton's work on LOGCAP in conference calls with investment analysts, referencing LOGCAP III as "our LOGCAP contract" and citing "our [Halliburton's] work" on the contract. Halliburton has extensively publicized its responsibility for services rendered under LOGCAP. According to a transcript of a November 29, 2005 investment analyst call, Halliburton's COO referred to the United States as "our customer" on LOGCAP III. Likewise, on a subsequent January 27, 2006 conference call with analysts, Halliburton's CEO termed the United States the purchasing "customer" of "our work" on LOGCAP III. During times pertinent to this Second Amended Complaint, Halliburton has assisted KBR, Inc. in performing various corporate functions, including, without limitation: information technology and communications; human resource services such as payroll and benefit plan administration; legal; tax; accounting; office space and office support; risk management; treasury and corporate

finance; and investor services, investor relations and corporate communications. Halliburton has a principal place of business at 5 Houston Center, 1401 McKinney, Houston, TX 77010. Halliburton submitted or caused the submission of the false claims and false statements at issue and otherwise is liable for the claims asserted.

6. Defendant KBR, Inc. is a Delaware corporation registered to do business in the State of Texas. KBR, Inc.: indirectly owns KBRSI and SEII; performs services for them (such as finance and human relations services) that are directly relevant to the misconduct alleged; submitted or caused the submission of the false claims and false statements at issue; and otherwise is liable for the claims asserted. KBR, Inc.'s principal office is located at 601 Jefferson Street, Houston, TX 77002.

7. Defendant[2] Kellogg Brown and Root Services, Inc. ("KBRSI") is a Delaware corporation. Defendant KBR, Inc. is an indirect parent of KBRSI. KBRSI does business at 4100 Clinton Drive, Houston, Texas 77020, and at other locations within this judicial district. It is the awardee of the government contract at issue, the LOGCAP III Contract.[3] KBRSI is a party

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[2] *See* Relator's Notice of Filing of Second Amended Complaint (Jan. 28, 2009) (addressing the naming of KBRSI as Defendant).

[3] Specifically, it is not the original awardee, but rather a successor. The legal entity that was the original awardee, and its affiliates, have experienced a variety of corporate reorganizations and transformations since the time of award, including an asbestos-related bankruptcy petition, and a well-publicized divestiture by corporate parent Halliburton, Inc. These contortions notwithstanding, the conduct described in this Complaint

to the Task Orders 59 and 89 of LOGCAP III at issue in this case. KBRSI submitted or caused the submission of the false claims and false statements at issue, and is otherwise liable for the claims asserted.

8. Defendant[4] Service Employees International, Inc. ("SEII") is a Cayman Islands corporation. Defendant KBR, Inc. is an indirect parent of SEII. The former parent company of KBR, Inc., i.e., Halliburton, Inc., has identified SEII as a subsidiary in filings with the U.S. Securities and Exchange Commission. On information and belief, SEII does business at 4100 Clinton Drive, Houston, Texas 77020. When Halliburton, KBR, Inc. and KBRSI have hired contract employees for work overseas, they frequently have diverted those employees to employment by SEII. Halliburton and KBR, Inc. treat SEII labor as "subcontract labor" for tax purposes, as reflected in their written statements to federal government auditors. On information and belief, Mr. Carter and many other employees described herein, whose work was billed to the U.S. Government, were SEII employees, at least nominally. SEII has been paid by KBRSI for services rendered by SEII's Reverse Osmosis Water Purification Unit ("ROWPU") employees described below in this Complaint. SEII submitted or caused the submission of the false claims and false statements at issue, and is otherwise liable for the claims asserted.

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is fairly attributed to each Defendant, or each Defendant is otherwise liable for it, as specifically alleged.

[4] See Relator's Notice of Filing of Second Amended Complaint (Jan. 28, 2009) (addressing the naming of SEII as Defendant).

JURISDICTION AND VENUE

9. The Court has subject matter jurisdiction to entertain this action under 28 U.S.C. §§ 1331 and 1345. The Court may exercise personal jurisdiction over the defendants pursuant to 31 U.S.C. §§ 3732(a).

10. Venue is proper in the Eastern District of Virginia under 31 U.S.C. §§ 3732 and 28 U.S.C. §§ 1391(b) and (c) because the defendants reside and transact business in this District.

ALLEGATIONS

THE LOGCAP CONTRACT

11. Since the early 1990s, the Department of Defense ("DoD") has used logistics support contracts to meet many of its logistical support needs during combat operations, peacekeeping missions, and humanitarian assistance missions. More recently, these contracts have supported contingency operations such as Operation Enduring Freedom (the War in Afghanistan) and Operation Iraqi Freedom. DoD relies on such contracts to provide supplies and services to the military.

12. In 1992, DoD created the Logistics Civil Augmentation Program (LOGCAP) contract as an umbrella support contract to provide all the support services necessary in a conflict. The Army awarded the first LOGCAP contract (LOGCAP I) in 1992 to Halliburton's Kellogg, Brown & Root subsidiary. Support services were provided under LOGCAP I to contingency operations in Haiti, Somalia and the Balkans. In 1997, LOGCAP (LOGCAP II) was awarded to

DynCorp Services to continue services in the Balkans. In 2001, LOGCAP III, Contract No. DAAA09-02-D-0007, was awarded to KBRSI's predecessor, Brown& Root Services, Inc., and to non-party Kellogg, Brown &Root, Inc. LOGCAP III has supported contingency operations in Iraq, Kuwait, Afghanistan, Dijbouti, Republic of Georgia, and Uzbekistan.

13. The Defendants have experience staffing the ROWPU position in combat theaters other than Iraq. For example, on dates previous to the Defendants' hiring of Mr. Carter for work in Iraq, Defendants had hired ROWPU Operators to perform water purification services in Afghanistan. The staffing of individuals such as Relator into the position in Iraq, and billing the Government for ROWPU services, was not a new endeavor for Defendants at the time Relator was hired. The concerted, fraudulent methods employed by Defendants to bill the Government for phantom ROWPU labor in Iraq, described below, were not the result of innocent mistakes made by a rookie contractor.

14. The LOGCAP III Contract is a cost-plus award fee contract. Under LOGCAP III, Task Orders are issued with specific Statements of Work for designated types of work and geographic areas of performance within Iraq.

15. For much of the relevant period, the largest LogCAP III task orders were Task Orders 59 and 89. Under these task orders and the statements of work issued thereunder, KBRSI provided a range of logistics support services. Relator was hired to provide water purification labor services in Iraq on behalf of

Defendants, as a ROWPU Operator, pursuant to LogCAP Task Orders 59 and 89.

16. Under LOGCAP, the Government "can terminate, reduce the amount of work, or replace [the LOGCACP] contract with a new competitively bid contract at any time during the term of the contract." See Halliburton Co. 10-Q Securities and Exchange Commission Quarterly Report, Oct. 31, 2005, at 39 (available at http://www.sec.gov A.

17. LOGCAP itself bears out this understanding on the part of Halliburton. The Contract incorporates by reference FAR 52.246-5. That FAR provision provides that "[i]f any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee ... If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, the Government may– ...Terminate the contract for default." Id(e)(2).

WATER PURIFICATION AND TESTING DUTIES

18. KBRSI was obligated under LOGCAP III, LOGCAP III Task Orders 59 and 89, and Statements of Work issued thereunder, to:

a. Treat (i.e., purify) water distributed for use by U.S. troops at base camps throughout Iraq, including at Ar Ramadi, where Relator was sited for much of his time in Iraq.

b. Test such water for purity.

c. Adhere to prescribed environmental standards, including those set forth in Department of Army Technical Bulletin MED 577 ("TB MED 577"), in treating and testing such water.

19. As reflected by a Statement of Work issued under LOGCAP Task Order 59 dated November 14, 2004, KBRSI's specific LOGCAP III contractual duties included, without limitation, "providing], installing], operating] and maintaining] potable and non-potable water systems, to include plumbing, sewage and gray/black water disposal, to facilitate the operation of facilities as directed by the A[dministrative] C[ontracting] O[fficer] (I[n] Accordance] W[ith] applicable Army regulations) and provide on-site storage as needed." Also stipulated under the Statement of Work is KBRSI's duty to "provide, emplace in Life Support Areas and maintain ablution units equipped with environmental control units, showers, mirrors, and sinks (1 head x 20 males and 1 head x 15 females) I[n] Accordance] W[ith] base camp populations and as directed by the A[dministrative] Contracting] O[fficer]....[and to] provide, fill, re-fill and maintain non-potable water holding tanks sufficient to store a three-day supply to the ablution units."

20. KBRSI was required to operate and maintain such potable and non-potable water systems and ablution units both at Ar Ramadi, Iraq, where Relator was sited for much of his time in Iraq, and at Al Asad, Iraq, where Relator separately observed De-

fendants' water purification activities, as further described below.[5]

21. As Mr. Carter was personally aware, an Army regulation denominated as TB MED 577 was an "applicable" regulation, per LOGCAP, to which KBRSI was subject in its discharge of its potable and non-potable water system operation and maintenance duties in Iraq.

22. TB MED 577 sets forth detailed water treatment and testing obligations incumbent upon KBRSI and the Defendants in their implementation of KBRSI's LOGCAP contractual duties. Among those duties were a requirement that water purification personnel, such as the personnel that Defendants hired and assigned to work in Iraq, including Mr. Carter, "[c]onduct tests of raw and product water for chemical agents and radioactivity as necessary."

23. TBMED 577 prescribed purification and testing duties specific to shower water, *i.e.*, water intended for use by troops in their showers. As to such water, "[w]ater storage tanks" were to be used "for treating and storing non-potable fresh water available on site." TB MED 577 further provided that although "water [intended for use by troops] for showers need not meet all of the drinking water standards, [such water] should not impair the health of personnel." Thus, per TBMED 577, KBRSI was required to en-

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[5] Potable water is water that is safe for human drinking purposes. Non-potable water is water that is unsafe to drink in large quantities, but which may be used for purposes such as laundering clothes and showering.

sure that such water was "chlorinated to at least a 1 p[arts] p[er] million] chlorine residual" level.[6] KBRSI was obligated to ensure that its ROWPU personnel such as Mr. Carter and his colleagues at Ar Ramadi conducted routine tests of the shower water: "[t]ests for chemical agents and radioactivity will be conducted weekly by water purification personnel." Further, KBRSI was required to "[r]ecord from where the water source was procured or supplied" and to "check [shower water]...every 8 hours...[for] chlorine residual [levels]."

24. Other obligations adhered to KBRSI pursuant to TBMED577. KBRSI was required to ensure that shower "wastewater and runoff will be discharged at least 25 yards downstream of the raw water intake."

25. TB MED 577 also required of KBRSI that "[o]pen top tank" water storage Containers "be covered" to prevent contamination.

26. TBMED 577 was updated by the Army in November 2005 and December 2005. The quoted provisions above are from the March 1986 version of the regulation, which immediately preceded the November 2005 version and remained in effect through November 2005. Provisions substantially identical to those cited above are reflected at pages 44, 46, 48, and 49 of the December 2005 version of TB MED 577.

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[6] One part per million of "Free Chlorine residual" was thus the minimum allowable amount. There are two types of chlorine residual, free and total chlorine. Free Chlorine indicates an on going availability of chlorine to effect disinfection.

27. In order to perform the water purification and testing services described under LOGCAP III, Task Orders 59 and 89, and the Statements of Work issued thereunder, KBRSI hired water quality specialists such as Mr. Carter to perform the subject duties.

RELATOR' S HIRING AND TRAINING BY THE DEFENDANTS

28. Mr. Carter initially applied for his position in late November 2004/early December 2004 with the Defendants through the "KBRJOBS.com" website.

29. The ROWPU Operator position was described on that website as one in which Relator would be involved in purifying water distributed for use to U.S. troops. Relator had the option to specify a preference for work in Afghanistan or Iraq. Relator expressed a first preference for ROWPU work in Afghanistan.

30. Relator filled out employment application paperwork which bore the lettering "Halliburton KBR" in the header.

31. At Defendants' request, Relator signed an "Applicant Personal Information Supplement" bearing the designation "Halliburton Companies" in the header. The opening paragraph of this supplement stated, "In connection with my application for employment with Halliburton Inc. and/or associated companies, I understand that..."

32. Relator received employment application materials via email from a Beth Laxton, "KBR Government Operations." Ms. Laxton's email address bore the suffix '@ halliburton.com.'

33. Relator received a call from a Defendant recruiter in early December 2004 offering him a position in Iraq.

34. Prior to embarking for Iraq, Relator received roughly 10days of training at Defendant facilities in Houston, Texas, along with roughly 700 other new employee-trainees. During this training, Defendants' employee-trainers emphasized to Mr. Carter and to the other trainees that their salaries for service in Iraq were paid for by the U.S. Government.

35. Prior to his arrival in Houston, Relator had received a document from the Defendants entitled, "ITINERARY/INFO PACKET CANDIDATE PROCESSING FOR LOGCAP III." This document contained the designation "KBR" in the header.

36. Once at Houston, Mr. Carter and the other trainees received training modules on several subjects, such as "Harassment Briefing," and "Medical Follow-up." Among the training modules was a session lasting one and a half hours entitled "LOGCAP III Project Briefing."

37. Relator and the other trainees received extensive framing from Defendants' personnel in the filling out of timecards to record their labor-hours worked once in Iraq. Defendants' personnel emphasized the following concerning the timecard process to Mr. Carter and the other trainees:

a. That each Defendant employee needed to retain his or her weekly timecard on his other person at all times once in Iraq, since Department of Defense auditing personnel could appear on site

at any moment and ask to see and inspect a given Defendant employee's timecard;

b. That the employees' timecards were to be submitted to the Government to secure payment for each Defendant employee's salary while in Iraq; and

c. That it was important that the timecards accurately reflect the employee's hours worked for each day while in Iraq, since any misrepresentation on a timecard could be construed by the United States Government as fraud.

38. At the Houston training, Mr. Carter, along with the other trainees, received a large binder/manual with the title "LOGCAP III Orientation." The material in this binder emphasized in exceptional detail that Halliburton/KBR Inc/KBRSI would receive reimbursement from the Government for the labor services that the trainees were about to provide in Iraq under the LOGCAP III Contract.

39. In Houston, Mr. Carter received a military identification card that he would carry with him at all times while in Iraq.

RELATOR'S ROWPU POSTING IN IRAQ

40. Once in Iraq at Ar Ramadi, Mr. Carter discovered that the Defendants' personnel required employees such as Mr. Carter to submit fraudulent timecards, on penalty of termination from employment.

Al Asad

41. Prior to arrival in Ar Ramadi, Mr. Carter was stationed in Al Asad, Iraq for three days, in mid-January 2005.

42. While in Al Asad, Mr. Carter was given a tour of Defendants' Al Asad ROWPU operations.

43. Comparatively speaking, the scale of Defendants' water processing operations at Al Asad was larger than at Ar Ramadi. At least 10 Defendant employees were nominally staffed as ROWPU employees assigned to the Al Asad site, including an individual named Dale Lehew.

44. Mr. Carter discovered during his tour of the Defendants' Al Asad ROWPU operations that the Defendants' water purification efforts there were a fiction.

45. Mr. Carter personally observed Defendant personnel using rejected drainage water that had cycled through the ROWPU process (i.e., per se highly contaminated water) and re-using such water as a raw input for the production of potable and non-potable water to be distributed for use by U.S. troops at Al Asad.

46. These activities resulted in purported water purification "services" that had no value whatsoever. The TBMED577 regulations clearly required "wastewater and runoff ...be discharged at least 25 yards downstream of the raw water intake." The Al Asad Defendant employees, including managerial employees, engaged in this activity were aware that

their labor "services" had no value whatsoever. Indeed, the "services" had negative value, in that they posed a prima facie and known–or readily knowable–risk of harm to those exposed to the purportedly "purified" water generated at Al Asad by the Defendants.

47. Defendants' ROWPU manager at Al Asad did not even know how to start the Reverse Osmosis Water Purification Unit at Al Asad, and a third country national (i.e., non-U.S. laborer) on site had to demonstrate to him how to start the unit.

48. Dale Lehew, who hailed originally from Oklahoma and whose position at Al Asad at the time of Mr. Carter's visit there was ROWPU Operator, had no background in water purification or testing whatsoever. His annualized salary was $84,000.

49. Mr. Carter had witnessed a cavalcade of pretend water purification specialists at "work."

Ar Ramadi

50. Per Defendant instruction, Mr. Carter traveled from Al Asad to the Junction City camp at Ar Ramadi and commenced work there in mid-January 2005.

51. Upon his arrival, Mr. Carter was told by the Defendant Ar Ramadi ROWPU foreman (Walter Meyers) that both non-potable and potable water at the Ar Ramadi site was being chlorinated and was safe.

52. Mr. Carter was stunned to find that he had no actual water purification or testing duties to perform between mid-January 2005 and early March 2005. He

repeatedly requested such work from Meyers, but told that there was no work that needed to be performed.

53. Between January 19, 2005 and late February, 2005, Mr. Carter retained his timecards on his person during the day, as per Defendants' Houston training instructions, until the end of the week.

54. During this time, and over his objections, he was required to fill in timecards stating that he worked 12 hour a day, each day, with uniformity, on ROWPU functions, per instruction of Walter Meyers and per instruction of Defendant Ar Ramadi Chief of Services Warren (Tom) Smith.

55. On these dates, he had actually worked 0 hours per day on ROWPU functions.

56. Meyers and Smith were aware that Mr. Carter had actually worked zero hours per day on these dates.

57. Mr. Carter was apprised by Smith that Mr. Carter's timecards were being submitted by Defendants' managerial personnel to the Government.

58. Mr. Carter was threatened with termination by Smith if Carter did not submit the timecards with the requested 12 hour time allocations. Specifically, Smith told Carter that "There are plenty of people back in Houston willing to take your job," if Carter did not go along with the timesheet scheme.

59. There were a total of 3 Defendant ROWPU personnel assigned to Ar Ramadi: foreman Walter

Meyers, who had been there since on or about September l, 2004 in that capacity, Mr. Carter, and, after mid-February 2005, Dale Lehew, who was transferred to Ar Ramadi from Defendants' Al Asad ROWPU operation.

60. The ROWPU personnel were part of a larger group of Defendant employee personnel at Ar Ramadi classified as "Trade" or "Operations and Maintenance" personnel. Other laborers in this category included carpenters and electricians. The total number of employees in this group was 30-40 employees.

61. If any Trade employee's as-submitted time card did not total exactly 12 hours per day and 84hours per week, he or she would be called in to the Operations manager's building over site radio frequency at the end of the work day to change the time card to align with the required 12 hr. day/84 hr. week total. This happened to Mr. Carter on several occasions; managerial personnel – principally, Don Mandy and Walter Meyers – would call Mr. Carter's code name over the radio intercom ("Water One") and request that Mr. Carter come to the managerial facility to change his time card.

62. The timesheets were printed on 8" x 11" paper, with the paper quality that of standard paper used for computer printouts. The timesheets contained a straightforward grid depicting the days of the week.

63. Meyers repeatedly bragged to Mr. Carter that he (Meyers) was earning a salary of $160,000 per year for his ROWPU foreman "duties."

64. Mr. Carter's annual salary rate was $84,000.

65. Mr. Carter's understanding was that Meyers, as per the routine practice of all other Trade personnel, was also submitting 12 hr. day/84 hr. week timesheets to be submitted to the Government.

66. In late February, the timesheet submission process changed.

67. Mr. Carter was gathered into a room with other Trade personnel and apprised that a government auditor would soon be arriving at the Camp Junction site. Defendant camp management, including Meyers and Smith, did not want to continue submitting both original and amended timesheets to the Government (as had been the case when employees of their own volition initially submitted timesheets that added to something other than 84 hours per week). Per instruction by Meyers and Smith, new timecard submission methods would be employed. Now, each employee would be required to leave his or her timesheets with camp management (as opposed to carrying them around on his or her person). Further, each evening at 7 PM, each employee, including Mr. Carter, would sign a daily timesheet entry in Smith and Meyers' presence.

68. Additionally, Meyers and Smith began requiring all employees, including Mr. Carter, to input their labor-hours worked figures for each Sunday on the Saturday evening before each Sunday. That way, according to Smith, "You'll get paid on time." Meyers and others would then play Softball on Sunday and bill the 12-hour labor day for Sunday to the Government.

69. This new fraudulent timesheet submission continued in effect from late February 2005 through April 2005, and, upon information and belief, continued during LogCAP performance after Mr. Carter left Iraq (April 2005).

70. The government auditor noted in paragraph 67 did ultimately arrive on site between late February and April 1st. When the auditor did arrive, Defendant Ar Ramadi site management instructed Trade personnel including Mr. Carter to "look busy" and drive around the Ar Ramadi site to create a false appearance of actual work being done.

71. In mid-February 2005, Dale Lehew commenced service as an Ar Ramadi ROWPU Operator, upon transfer from Al Asad.

72. As noted, Mr. Lehew's annualized salary was $84,000.

73. Mr. Carter was instructed by Meyers to personally review Lehew's timesheets to ensure that they were consistent with those of Carter and Meyers (i.e., that Lehew's timesheets also included Active hour tallies).

74. It was not until early March 2005 that Mr. Carter was allowed to inspect the Ar Ramadi Camp Junction base water delivery systems.

75. Mr. Carter was promoted to acting ROWPU foreman when Meyers left the base for the United States on a two-week vacation leave.

76. To that point, no Defendant managerial staff member had provided Mr. Carter with any Iraq Theatre-wide or Ar Ramadi site-specific set of instructions, policies or procedures, or any other information regarding the operation of the ROWPU or maintaining water quality standards for military and civilian personnel on the base.

77. To that point, Mr. Carter was not aware of the existence of any records reflecting that the Defendants had conducted tests of any kind on non-potable or potable water at Ar Ramadi.

78. None of the equipment that would have been necessary to conduct weekly tests for chemical agents and radioactivity on water to be distributed for use to U.S. troops for showering was on hand or available for Mr. Carter's use.

79. At the threat of being fired, Mr. Carter was required to continue to bill his time to the Government notwithstanding the factual impossibility of his having performed water purification or testing activities.

80. On March 23, 2005, with Meyers on leave and Mr. Carter serving as acting ROWPU foreman, a Defendant Labor Foreman stationed in Ar Ramadi reported to management that he had discovered an organism in the toilet of his living quarters (i.e., vestibule). On inspection, Carter confirmed that a larvae was swimming in the Labor Foreman's toilet bowl.

81. Carter took the initiative to test the running lavoratory water in the employee's bathroom for chlo-

rination. The test results indicated no presence of chlorine.

82. In conducting such tests, Mr. Carter relied on recently acquired spectrophotometers (testing tools).

83. Testing kits that included spectrophotometers for accurately measuring chlorine had never been present at Camp Ramadi until late March 2005. Such tools only arrived at that juncture because Mr. Carter advised Defendant Ar Ramadi Site Manager, Suzanne Raku Williams, that spectrophotometers were an absolutely mandatory tool in order for Defendants to carry out their LOGCAP III/TB MED 577 testing obligations.

84. During his entire time at Ar Ramadi, Relator never observed the presence of tools that would have allowed Defendants to test for chemical agents and/or radioactivity levels in water.

85. As a result of Mr. Carter's preliminary tests at the Labor Foreman's vestibule, Mr. Carter determined that the vestibule's lavatory water, including the water from that lavatory's sink and shower, was not fit for human use.

86. Concerned that the entire water system of the base was compromised, Carter suggested to Defendant site managers that the military be notified that their water needed immediate super-chlorinization. He was told by site manager Suzanne Raku-Williams that the military was, quote, "none of" Carter's concern.

87. Among the maladies that untreated water can cause exposed humans are salmonellois, shigellosis, cholera, amebias, giardiasis, and diarrheal disorders.

88. On March 24, 2005, Mr. Carter, at the suggestion of Mo Orr, a Defendant Health, Safety, and Environmental employee, committed his findings to writing in an email directed to Defendant managerial personnel. Mr. Carter sent a three paragraph, 587 word email to Suzanne Raku-Williams (Defendant Ar Ramadi Site Manager), Warren Smith (Chief of Services), Lisa Waterman (Administrative Specialist, O&M Service), and Walter Meyers (ROWPU Foreman, Acting O&M Manager), describing his finding of the toilet larvae and discussing the implications thereof. In his email, Mr. Carter stated, in part, that upon finding the larvae cited in paragraph 80 above, "I then immediately tested the cold water from the...sink in [Ross' vestibule] for free chlorine. There was none detected. It had been my understanding that this water was non-potable but was chlorinated."

89. Mr. Carter then tested other locations at which non-potable water was distributed and stored by Defendants at the Ar Ramadi base. These other locations included the Ar Ramadi communications room and the site's main non-potable water storage tanks. His tests at these other locations confirmed that non-potable water at such other locations was also not being purified. Further, the non-potable water storage tanks, which had an open top structure, were uncovered.

90. Based on the full sum of these test results and the lack of any base testing records of any kind, Mr.

Carter concluded that, during Walter Meyers' time as ROWPU foreman from September 1, 2004 through mid-March 2005, Meyers had not been performing any water tests of any kind. Meyers' work was fictive.

91. Mr. Carter then apprised Captain Matthew Hing of his findings. Hing was not aware that the Defendants had been failing to purify or test the non-potable water at Ar Ramadi. Hing had overall responsibilities for medical safety of personnel at the Ar Ramadi base.

92. Based on his conversation with Hing, Mr. Carter concluded that the Defendants had failed to apprise the Government of the ongoing failure to test or treat non-potable water.

93. Within a few days, in late March 2005, a Terrence Copling from Halliburton/KBR[7] Employee/Labor Relations arrived at Camp Junction, apparently assigned to investigate the recent events at Ar Ramadi unrelated to Mr. Carter's water findings.

94. Contemporaneous with the Copling visit, on March 25, 2005, Mo Orr, the Defendant Health, Safety, and Environmental employee noted at paragraph 88 above, resigned in disgust. He stated in his resignation statement that he would no longer work "in an environment where deception and fraud are commonplace." Orr sent this resignation email to David Halliday, Damon Scarborough, Darwin Mixon, Danny Gregory, Jason Walsh, Don Mandy, Jurgen Stringer,

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[7] *See* Footnote 9, *infra*.

Kenneth May, Walter Duvall, and Harry Grocholski (all of whom, upon information and belief, were Defendant employees), and Mr. Carter.

CARTER'S INVESTIGATORY EFFORTS

95. While Copling was on site, Mr. Carter related his recent water testing and purification and testing findings to Copling.

96. Copling assured Mr. Carter that managerial personnel involved in the Ar Ramadi fraud identified by Mr. Carter would be terminated.

97. Mr. Copling remained on site at Ar Ramadi for approximately 3 days, leaving on or about March 27, 2005.

98. After Mr. Copling left the Ar Ramadi site, Mr. Carter emailed him frequently.

99. Mr. Copling did not return those emails.

100. In April 2005, a Defendant employee named Phillip Daigle, whose title, upon information and belief, was Medic, gave a speech to all Defendant employees at the Ar Ramadi site. Mr. Carter attended this meeting, but was not offered the opportunity to speak at it. The meeting was an all-hands-on-deck safety meeting (one was held every Sunday, on various topics). The subject of this meeting was to address the potential risks associated with the nonpotable water supply at Ar Ramadi. Phillip Daigle purported to offer Defendants' managerial perspective on recent water-related issues at Ar Ramadi. Defendant Ar Ramadi Chief of Services Manager Smith intro-

duced Daigle by stating, "Ben [Carter's] doing a great job with the water situation here and he's got the situation under control." During the speech, Daigle stated that the "only risk" potentially associated with the assembled audience's exposure to non potable water over the months immediately preceding the speech was the risk of exposure to hepatitis.

101. Mr. Carter, out of disgust at the rampant and wanton fraud to which he bore witness, resigned from service to the Defendants, leaving their service in April 2005.

102. During the entire period of Mr. Carter's employment by Defendants, Mr. Carter observed no documentation purporting to reflect that Defendants had actually performed any tests required under the LOGCAP Contract.

103. Relator continued his investigation of Defendants' fraud after leaving Defendants' employ.

104. Mr. Carter contacted Halliburton employee relations representative Janet Little on July 13, 2005 concerning the water testing, purification, and billing issues described in this Amended Complaint.

105. Mr. Carter received an email message from Wit Granger, Defendants' Theater Water Quality Manager for Iraq and Kuwait, on July 21, 2005.

106. Mr. Granger apprised Mr. Carter that Mr. Carter's original whistle-blowing email of March 24, 2005, and his other whistle-blowing activities during that week, did in fact ultimately prompt Defendants to dispatch Granger to evaluate the on-the-ground

water testing and treatment conditions at Ar Ramadi. In that July 21, 2005 email, Mr. Granger related that he completed his investigation on May 13, 2005. Mr. Granger further related that he had investigated the extent of documentation at other sites in Iraq that would support the conclusion that Defendants had conducted the water testing required under LOGCAP.

107. As detailed to Mr. Carter by Mr. Granger in that July 21, 2005 email (forwarding earlier emails authored by Granger dated July 15, 2005 and directed to Defendant managerial personnel), Mr. Granger's investigation corroborated Mr. Carter's initial findings.

108. Specifically, Granger found that:

a. The Defendants had exposed the base camp population at Ar Ramadi to a water source that had not been treated, i.e., purified. The level of water at Ar Ramadi was roughly 2 times the normal contamination level of untreated water from the Euphrates River. Granger's findings concluded that the Ar Ramadi base camp population would have been better off receiving raw water from the Euphrates River as its non-potable water source than the water it had been receiving through May 2005.

b. Granger confirmed in his email that the contamination was believed to have been ongoing through the entire life of the camp, from September 1, 2004 through late May 2005 – a nine month period.

c. Granger further stated that he had yet to find a Defendant-operated installation in Iraq where documentation existed to support the conclusion that the Defendants had performed any of the non-potable shower water testing required under LOGCAP III.

d. Granger additionally stated that he knew of no effort to inform the exposed population at Ar Ramadi of the water problems Granger had identified.

109. Mr. Granger related to Mr. Carter in the July 21, 2005 email that Mr. Granger had sent the results of the above-noted investigation on May 13, 2005 to six members of KBR/Halliburton's senior management team, including KBR/Halliburton's Vice President with overall responsibilities for the LOGCAP III Contract.

110. Janet Little of Halliburton, noted above, referred Mr. Carter to Faith Sproul, Workers' Compensation Manager for Halliburton Company.

111. On July 22, 2005, Mr. Carter sent a 43-word email to Faith Sproul. He asked Sproul "who [he] should contact" regarding the problem presented by contaminated water at Ar Ramadi and at other sites in Iraq. Mr. Carter asked Ms. Sproul if she had "seen the results of William Granger's report about the level of contamination and duration [of contamination] at Ramadi and other sites in Iraq?"

112. Sproul responded via email on that same date and stated that an individual named Chuck Murtoff was the appropriate point of contact, and that

Murtoff s position was "Senior Manager for Employee Relations for our Government Operations."

113. On the afternoon of August 3, 2005, Mr. Carter was contacted by telephone by Murtoff. During the telephone call, Murtoff stated that Halliburton/KBR had formed a "special investigation team "to look into Mr. Carter's allegations.

114. Upon information and belief, Defendants' formation of this "special investigation team" was prompted by Mr. Carter's July 22, 2005 email to Faith Sproul.

115. The members of the "special investigation team" included the aforementioned Terrence Copling and Defendants' employees Donnie Askew, Jerry Allen, and Vic DeLeque.

116. On August 26, 2005, Mr. Murtoff emailed Mr. Carter to state that "our investigator would like to speak to you regarding your knowledge of the contaminated water incident at B4."[8]

117. According to that August 26, 2005 email, Murtoff's title was Senior Manager, Employee/Labor Relations for"Halliburton/KBR."[9]

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[8] Ar Ramadi is conventionally known by the Government and by Defendants and Defendants' personnel as site"B4."

[9] Mr. Murtoff's employer was reflected as "Halliburton/KBR" (Mr. Murtoff's own words) in email correspondences to Mr. Carter. Such emails contained a signature line authored by Mr. Murtoff stating, verbatim, "Chuck Murtofff,] Halliburton/KBR[,] Sr. Manager Employee/Labor Relations."

118. On August 28, 2005, Donnie Askew, special investigator for Halliburton spoke with Mr. Carter by telephone from Baghdad. Mr. Carter provided answers to all of Askew's questions concerning his knowledge of the water systems operations at Ar Ramadi.

119. On August 29, 2005, Mr. Murtoff emailed Mr. Carter again. He stated that "the company has reached conclusion on the review of the contaminated water issue brought to our attention by yourself ..." Mr. Murtoff did not state any specific findings from the review in his email. The email did not note any intention by "Halliburton/KBR" to take any further action in connection with the review, either with regard to the subject health risks or the billing of the Government.

120. Based on these email exchanges, including the empty statements by Mr. Murtoff concerning Defendants' "investigation," Mr. Carter concluded that the Defendants had continued to fail to apprise the Government that the Defendants had not been performing the testing and water purification duties noted in this Amended Complaint, *i.e.*, those that they were obligated to perform under LOGCAP; or that Defendants had taken corrective action with regard to the associated false billing.

121. On January 23, 2006, Mr. Carter testified before the Senate Democratic Policy Committee concerning his observations of Defendants' activities in Iraq.

PHANTOM ROWPU LABOR AT AR RAMADI

122. At varying points in time from September 1, 2004 through May 1, 2005, one (first, solely Meyers), two (Meyers and Carter), and then three (Meyers, Carter, and Lehew) men were nominally staffed by Defendants to water testing and purification duties at Ar Ramadi, Iraq.

123. Meyers repeatedly bragged to Mr. Carter about the level ($160,000 per annum) of his salary as ROWPU Foreman. Meyers came to Ar Ramadi on or about September 1, 2005.

124. Mr. Carter and his ROWPU colleagues at Ar Ramadi received salary payments every two weeks during the subject period.

125. Mr. Carter and his ROWPU colleagues received these salary payments at a Defendant Ar Ramadi Operations office from an employee named Don Mandy. The format of the payment receipts was in an envelope bearing each employee's name. The envelope typically contained a pay stub and cash.

126. Mr. Carter and his colleagues received a portion of their bi-weekly pay from Defendants in cash, with the remainder of the pay being sent by Defendants via direct deposit to the employee's banking institution of choice in the United States.

127. Mr. Carter was personally aware that Dale Lehew and Walter Meyers received their salary payments in this fashion.

128. As alleged both *supra* and *infra*, all of the above salaries were billed to and ultimately paid by the Government pursuant to LOGCAP III.

PHANTOM ROWPU LABOR AT AL ASAD

129. At least 10 Defendant employees were nominally staffed as ROWPU employees assigned to the Al Asad site.

130. Pursuant to the salary disbursement procedures with which Relator first became personally familiar at his Houston training sessions conducted by the Defendants – including, among other sources, the LOGCAP III Orientation binder distributed during those sessions – upon information and belief, the noted 10+ Al Asad ROWPU employees' time were billed under LOGCAP III, and those employees collected biweekly paychecks in a fashion identical to, or substantially identical to, that detailed at paragraphs 124 to 126, above.

131. As alleged, the Al Asad Defendant ROWPU employees were not engaged in any actual water purification duties on discrete dates in January 2005. Upon information and belief, for all dates preceding January 2005 during which such employees were sited at Al Asad, these same ROWPU employees were similarly tasked by the Defendants to labor duties that did not involve water purification or testing. Further, upon information and belief, such diversion of ROWPU labor to tasks that did not support Defendant ROWPU contracting duties continued during LogCAP performance after Mr. Carter left Al Asad.

PHANTOM ROWPU LABOR AT OTHER SITES IN IRAQ

132. As noted, the Defendants were required by the Government to supply ROWPU services under LOGCAP III at dozens of sites in addition to Ar Ramadi and Al Asad.

133. Byway of example, one other such site was the campsite in Ar Ramadi adjacent to the Camp Junction camp, known as Blue Diamond.

134. Atone point, Mr. Carter asked of Meyers that he be permitted to travel to the Blue Diamond campsite to observe Defendants' ROWPU operations at that site.

135. Meyers denied Mr. Carter the permission to make this visit. Meyers' permission was required in order for Mr. Carter to travel to Blue Diamond, since Mr. Carter would have needed to receive a military pass to make the trip (pursuant to U.S. travel strictures in place in Iraq), even though a short one.

136. The Defendants were obligated under LOGCAP III to supply water purification and testing services for the military at sites throughout Iraq other than Ar Ramadi/Camp Junction and Al Asad.

137. As noted, Defendants' Theater Water Quality Manager for Iraq and Kuwait stated to Carter in July 2005 that he (Granger) had yet to find a Defendant-operated installation in Iraq where documentation existed to support the conclusion that the Defendants had performed any of the non-potable shower water testing required under LOGCAP III.

138. Upon information and belief, the Defendants billed the Government for the labor costs of ROWPU employees staffed at such other sites, notwithstanding that Defendants were aware at the time that they billed the Government for such labor costs that the ROWPU laborers in question had not performed any of the non-potable water testing duties mandated under LOGCAP and described in this Complaint.

THE LOGCAP CONTRACT: ADDITIONAL BILLING FACTS

139. KBRSI submitted LOGCAP bills, including those at issue in this Second Amended Complaint, to officers and employees of the United States Government for payment or approval. KBRSI received payments from the Government for these bills.

140. LogCAP is a cost-reimbursable (specifically, CPAF) contract. LOGCAP contains both a 1% base fee provision, set forth at Section H36 of the contract (a fixed profit percentage applied to actual costs to complete the work), and an award fee provision (a variable profit percentage applied to "definitized" costs, which is subject to the U.S. Government's discretion and tied to the specific performance measures defined in the contract), also set forth at Section H36 of the contract. Base fee revenue is recorded at the time services are performed, based upon actual project costs incurred (including labor), and includes reimbursement for general, administrative, and overhead costs. Per Section H36 of the LOGCAP contract, an award fee is granted periodically by the U.S. Government based on an evaluation of Defendants' per-

formance under the LOGCAP contract as evaluated by a LOGCAP Award Fee Evaluation Board (AFEB).

141. More specifically, the Federal Acquisition Regulation ("FAR"), Title 48 of the Code of Federal Regulations, identifies a cost reimbursement contract as one providing "for payment of allowable incurred costs, to the extent prescribed in the contract." FAR 16.301-1.

142. A CPAF contract pays the contractor not only allowable incurred costs permitted by the contract (as any cost reimbursement contract does), but also "a fee consisting of (a) a base amount , and (b) an award amount, based on a judgmental evaluation by the Government." FAR 16.305; see also FAR 16.405-2.

143. A CPAF contract, unlike a cost-plus-incentive-fee ("CPIF") contract, generally calculates the fee in relation to total allowable costs actually incurred under the contract, not target costs. Thus in a CPAF contract like LogCAP, there is no direct penalty for cost overruns (although the Government may consider cost-effectiveness when determining the award amount).

144. The payment of an award fee, consisting of a base amount plus an award amount, is reflected in the LogCAP Contract, for instance at Contract Line Item Number ("CLIN") 0009, on Page 7 of the LogCAP Contract.

145. Pursuant to LOGCAP contract clause FAR 52.216-7, incorporated into the contract at page 36, KBRSI submits LOGCAP claims for payment "as work progresses." Also per FAR 52.216-7, KBRSI's

payment claims include claims for its incurred labor costs, such as the cost of the labor of employees tasked to work on water purification.

146. Section H.36 of the LogCAP Contract provides for a maximum award fee of 3%. The LogCAP base fee is 1% of allowable cost. The "earned" award fee is up to 2% of cost, based on KBR's award fee score, as determined by AFEB. The AFEB evaluates Defendants' performance under LOGCAP as "Excellent," "Very Good," "Good," or "Average," in deciding on an award fee to be tendered to Defendants, pursuant to procedures set forth at Pages 11-17 of Attachment 002 of the contract. As set forth at pages 11 and 12, under LOGCAP, the contractor's receipt of an award fee is contingent on the contractor's receipt of a performance rating of "Good," "Very Good," or "Excellent."

147. As described at page 11 of attachment 2 to the contract, in order to receive its award fee, the LOGCAP contractor must submit to the Government a "written assessment describing its performance" under the contract.

148. In 2006 alone, the Defendants received $120 million in LogCAP award fees.

149. The U.S. Army has awarded the Defendants most, although not all, of LogCAP's 2% "earned" award fee. Both the base fee and the "earned" award fee are calculated on the basis of Defendants' incurred costs.

150. The only constraint on this phenomenon that Defendants profit from LogCAP waste, fraud

and abuse - is when the Defendants gets caught. Getting caught can lead to: the disallowance of costs submitted as allowable costs in LogCAP claims; a reduction in the percentage of the "earned" award fee; a reduction in the fixed base fee; a reduction in the costs found to be allowable under the contract; and the treble damages and penalties recoverable in this action, inter alia. These remedial actions can occur, however, only when the Defendants get caught.

151. Since DoD pays Defendants for its LOGCAP work for all costs that the Defendants claim as allowable under the terms of the LOGCAP contract, Defendants have no incentive to minimize its costs of performing its LOGCAP contracting duties.

152. Since the task orders are awarded without competition, the normal constraint that competition imposes on waste, fraud and abuse has been eliminated.

153. The Defendants submit "cost or pricing data" with its task order proposals, to help DoD judge cost realism and reasonableness in the pricing of these task orders.

154. As a result, the Defendants do not even try to economize on LogCAP expenditures. On the contrary, as outlined above, the Defendants consciously endeavor to waste money because higher costs result directly in higher base and award fees.

155. Page 36 of the LogCAP Contract incorporates by reference Federal Acquisition Regulation ("FAR") 52.216-7 ("Allowable Cost and Payment"). Paragraph (a)(I) of FAR 52.216-7 mandates that the contractor

"submit to an authorized representative of the Contracting Officer... an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract." FAR52.216-7(a)(l).

156. "Allowable costs" are defined under FAR 52.216-7 as follows:

For the purpose of reimbursing allowable costs (except as provided in paragraph (b)(2) of this clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only-

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for –

(A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made-

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government;

(B) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(C) Direct labor;

(D) Direct travel;

(E) Other direct in-house costs; and

(F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(iii) The amount of financing payments that have been paid by cash, check, or other forms of payment to subcontractors.

FAR 52.216-7(b).

157. KBRSI was required under LOGCAP, at page 32, to submit an invoice form known as "DD Form 250," or its electronic equivalent, to obtain payments from the government.

158. The Government, pursuant to published guidance issued by the Defense Contract Management Agency, requires that contractors report "known deficiencies," including any "unperformed

tests" on the Form 250 in order to obtain LOGCAP payments from the Government.

159. As enumerated above at, without limitation, paragraphs, 5, 6, and 8, SEII, Halliburton, and KBR, Inc. caused KBRSI to submit payment claims to the Government for the labor of ROWPU employees.

160. Page 1 of the LOGCAP contract provides that payments under the contract will be made by the Defense Finance & Accounting Service ("DFAS"), Rock Island Operating Location, Building 68, Rock Island, Illinois 61299. KBRSI – and any other Defendant with knowledge of this information, are thereby aware that KBRSI's LogCAP claims will be presented to DFAS – at that location. On information and belief, Halliburton, SEII, and KBR, Inc. were aware of this information. Upon information and belief, during the pertinent time period, DFAS further processed KBRSI's LogCAP claims in: Indianapolis, Indiana; Kansas City, Missouri; Cleveland or Columbus, Ohio; and/or Denver, Colorado, inter alia.

First Claim – SCHEME TO SUBMIT FRAUDULENT CLAIMS (FCA § 3729(a)(1))

155. All of the preceding allegations are incorporated herein.

156. KBRSI has submitted LogCAP claims for payment to a variety of U.S. Government offices, as alleged in detail above. Each of these offices is staffed by officers or employees of the United States Government or members of the Armed Forces of the United States. Such KBRSI LogCAP claims have

been received by such officers, employees and members.

157. KBSRSI knowingly presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

158. Halliburton, KBR. Inc., and SEII knowingly caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

159. As alleged above, during the period between the beginning of the applicable limitations period and the time that this lawsuit is resolved, the Defendants have performed under LogCAP.

160. The Defendants engaged in a scheme to defraud the United States Government into approving or paying false LOGCAP claims.

161. Beginning in or around September 1, 2004, and continuing through April 2005, Defendants knowingly and intentionally presented claims for payment to the United States for the salaries of employees staffed as Ar Ramadi ROWPU personnel, with knowledge that:

a) Employee Walter Meyers was not engaged in any water testing or purification duties in support of the LOGCAP Contract; and, further, that

b) Employee Benjamin Carter was prevented from engaging in meaningful water testing or purification duties in support of the LOGCAP Contract; and, further, that

c) Employee Dale Lehew was not engaged in any water testing or purification duties in support of the LOGCAP Contract;

d) That Defendants were billing the Government for work that was not actually performed;

e) The Defendants thus tried to get paid for work that they had not actually done.

162. Upon information and belief, these fraudulent submissions continued during LogCAP performance after Mr. Carter left Iraq; and, absent action by the Court, will continue during the pendency of this action.

163. Defendants knowingly and intentionally presented claims for payment to the United States for the salaries of employees staffed as Al Asad ROWPU personnel, for the period of service of such personnel during January 2005, with knowledge that:

a) Employee Dale Lehew was not engaged in any water purification duties in support of the LOGCAP Contract;

b) That all other 9+ Defendant ROWPU employees were not engaged in any water purification duties in support of the LOGCAP Contract; and

c) That Defendants were billing the Government for work that was not actually performed;

The Defendants thus endeavored to get paid by the Government for work that they had not actually done.

164. On information and belief, such false and fraudulent conduct preceded the period of Mr. Carter's observations of Defendants' Al Asad ROWPU activities; it has continued during LogCAP performance after Mr. Carter left Al Asad; and, absent action by the Court, it will continue during the pendency of this action.

165. Upon information and belief, Defendants were also aware that the aforementioned Al Asad ROWPU employees were not engaging in any water testing duties in support of the LOGCAP Contract, yet knowingly and intentionally presented claims for payment to the United States for the salaries of such employees.

166. Commencing after April 1, 2003, and continuing during LogCAP performance after Mr. Carter left Iraq, Defendants knowingly and intentionally presented claims for payment to the United States for the salaries of employees staffed as ROWPU personnel at sites other than the Camp Junction Ar Ramadi site and the Al Asad site in Iraq, with knowledge that:

a) Such personnel were not engaged in any water testing or purification duties in support of the LOGCAP Contract; and

b) That Defendants were billing the Government for work that was not actually performed;

The Defendants thus endeavored to get paid by the Government for work that they had not actually done.

167. All such fraudulent claims resulted in:

a) excessive direct costs (excessive direct labor);

b) resultant excessive indirect cost charges (applied to the excessive or inflated direct costs);

c) resultant inflated indirect cost rates; and

d) enhanced "base fee" payments premised upon the unnecessary labor components;

e) an enhanced award fee under the contract; and

f) a purposeful avoidance of the LOGCAP Contract penalty provisions, including contract termination, as set forth at FAR 52.246-5(e)(2).

167. On information and belief, KBRSI billed the Government under LogCAP for reimbursement of the labor costs of ROWPU employees during the subject time period at least once each month, and as often as every two weeks. Each LogCAP invoice submitted from the beginning of the applicable limitations period in support of this fraudulent scheme and continuing through the resolution of this lawsuit, was, is and will be a false or fraudulent claim, for all the reasons alleged above.

Second Claim – FALSE CLAIMS, OMISSION OF REQUIRED INFORMATION (FCA § 3729(a)(l))

168. All of the preceding allegations are incorporated herein.

169. The Government requires that contractors such as Defendants to report "known deficiencies," including any "unperformed tests" on Form 250s or their equivalent in order to obtain LOGCAP payments from the Government.

170. Pursuant to Defense Contract Management Agency guidance, KBRSI was under an obligation to disclose to the Government that it had not performed required non-potable water purification tests at Ar Ramadi, Al Asad, and other sites throughout Iraq, in its DD250 or form equivalent claim submissions to the Government.

171. KBRSI intentionally and willfully omitted this required information in its DD 250 or equivalent form claim submissions to the Government requesting payments from the Government for the salaries of the employees noted in this Complaint, during the time periods noted in this Complaint.

172. Upon information and belief, Halliburton, KBR, Inc., and SEII took affirmative steps to prevent KBRSI from disclosing the required information to the Government in the DD250 or equivalent form claim submissions cited above.

173. In the alternative, Halliburton, KBR, Inc., and SEII willfully and knowingly withheld the required information from KBRSI.

174. The omissions thereby allowed the Defendants to fraudulently collect payments for the ROWPU labor services noted above in this Amended Complaint.

175. The omissions further allowed the Defendants to purposely avoid the LOGCAP contract penalty provisions, including contract termination, specified at FAR52.246-5(e)(2).

176. The omissions thus allowed Defendants to fraudulently collect payments for all other services rendered under LOGCAP separate and apart from ROWPU labor service payments.

177. The omissions further allowed the Defendants to collect a contract award fee larger than that to which they were contractually entitled.

Third Claim – SUBMISSION OF CLAIMS CONTAINING FALSE EXPRESS OR IMPLIED CERTIFICATIONS (FCA § 3729(a)(1))

178. All of the preceding allegations are incorporated herein.

179. The DD Form 250 contains an express certification that the contractor's performance conforms to the contract.

180. In many cases, especially in recent years, the submission of DD Form 250s has been superseded by the electronic submission of equivalent claims for payment.

181. On information and belief, such electronic substitutes also expressly certify that the contractor's performance conforms to the contract.

182. On information and belief, KBRSI's LogCAP claims for payment contain such certifications.

183. KBRSI billed the Government under LogCAP for reimbursement of the labor costs of ROWPU employees during the subject time period. On information and belief, KBRSI submitted these bills at least once each month, and as often as every two weeks.

184. Each invoice submitted by KBRSI for payment of salary costs of ROWPU employees stationed at Ar Ramadi for periods of labor including, but not limited to, August 2004-April 2005, were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP and were, and are and will be, false or fraudulent claims for their false express certification of compliance with the LOGCAP contract. KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

185. Each invoice submitted by KBRSI for payment of salary costs of ROWPU employees stationed at Al Asad for the periods of labor encompassed by Defendants' fraud, were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP and were, and

are and will be, false or fraudulent claims for their false express certification of compliance with the LOGCAP contract. KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

186. Each invoice submitted by KBRSI for payment of salary costs of ROWPU employees stationed at camps other than the Ar Ramadi Cam Junction camp and the Al Asad camp for the periods of labor encompassed by Defendants' fraud, were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP. These invoices were, and are and will be, false or fraudulent claims for their false express certification of compliance with the LOGCAP contract. KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

187. Regardless of whether the contractor's claim expressly certifies that the contractor's performance conforms to the contract, the submission of the claim constitutes an implied certification that the contractor's performance conforms to the contract.

188. When the contractor's performance does not conform to the contract, this certification is false or fraudulent.

189. Each invoice submitted by KBRSI for payment of salary costs of employees described supra at paragraphs 184 through 186 were unaccompanied and unsupported by true and accurate statements of allowable costs for performance under LOGCAP. These invoices were, and are and will be, false or fraudulent claims for their false implied certification of compliance with the LOGCAP contract. KBRSI and the other Defendants thus knowingly presented, or caused to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, false or fraudulent claims for payment or approval.

Fourth Claim – FALSE STATEMENTS (FCA § 3729(a)(2))

190. All of the preceding allegations are incorporated herein.

191. Every timesheet submitted by Defendants to the Government in support of the purported cost of labor of ROWPU employees stationed at Ar Ramadi, Iraq for any one-week time period from September 1, 2004-April 2005 comprised false records or statements and false statements of costs claimed to be allowable under FAR 52.216-7. All such false records or statements were made to the Government to get false or fraudulent claims paid or approved by the Government.

192. Defendants knowingly presented false statements and records to the Government in an effort to get false or fraudulent claims paid or approved by the Government, including, inter alia:

a) Each statement submitted in support of claims for payment of salary costs of ROWPU Foreman Meyers for the period of labor spanning September l, 2004 through September 5, 2004;

b) Each statement submitted in support of claims for payment of salary costs of ROWPU Foreman Meyers for the period of labor spanning September 6, 2004 through September 12, 2004;

c) Each statement submitted in support of claims for payment of salary costs of ROWPU Foreman Meyers for each weekly period of labor dating from September 13, 2004, through May 27, 2005, inclusive;

d) Each statement submitted in support of claims for payment of salary costs of Relator for the period of labor spanning January 19, 2005 through January 23, 2005;

e) Each statement submitted in support of claims for payment of salary costs of Relator for the period of labor spanning January 24, 2005 through January 30, 2005;

f) Each statement submitted in support of claims for payment of salary costs of Relator for each weekly period of labor dating from January 31, 2005, through April 17, 2005, inclusive;

g) Each statement submitted in support of claims for payment of salary costs of ROWPU Operator Lehew for the period of labor spanning February 14, 2005 through February 20, 2005;

h) Each statement submitted in support of claims for payment of salary costs of ROWPU Operator Lehew for the period of labor spanning February 21, 2005 through February 27, 2005;

i) Each statement submitted in support of claims for payment of salary costs of ROWPU Operator Lehew for each weekly period of labor dating from February 28, 2005, through May 27, 2005, inclusive;

j) Each statement submitted in support of claims for payment of salary costs of every Defendant ROWPU Operator, ROWPU Foreman, and other ROWPU personnel in Iraq other than those employees enumerated at sub-paragraphs a) through i) above, whom Defendants knew were factually precluded from performing required LOGCAP testing duties during the period between the beginning of the applicable limitations period and the time that this lawsuit is resolved, for reasons including, but not limited to, Defendants' failure to procure and make available to such personnel water testing equipment necessary for Defendant KBRSI's fulfillment of its duties under the LOGCAP Contract.

193. The Defendants thus knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the Government.

PRAYER FOR RELIEF

WHEREFORE, for each of these claims, the Qui Tam Plaintiff requests the following relief from each of the Defendants, jointly and severally:

A. Three times the amount of damages that the Government sustains because of the acts of the Defendant;

B. A civil penalty of $11,000 for each violation;

C. An award to the Qui Tam Plaintiff for collecting the civil penalties and damages;

D. Award of an amount for reasonable expenses necessarily incurred;

E. Award of the Qui Tam Plaintiffs reasonable attorneys' fees and costs;

F. Interest; and

G. Such further relief as the Court deems just.

JURY DEMAND

Relator hereby demands trial by jury.

Respectfully submitted,

/s/ W. Clifton Holmes
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Dated: June 2, 2011

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
Alexandria Division

UNITED STATES OF AMERICA *EX REL.* BENJAMIN CARTER,	)	1:11cv602 (JCC/JFA)
	)	Filed Under Seal Pursuant to 31 U.S.C. § 3730(b)(2) and (3)
Plaintiff/Relator,	)	
v.	)	
HALLIBURTON COMPANY, *et al.*	)	
Defendants.	)	

THE UNITED STATES' NOTICE OF ELECTION TO DECLINE INTERVENTION

Pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the United States hereby notifies the Court of its decision not to intervene in this action.

Although the United States declines to intervene, we respectfully refer the Court to 31 U.S.C. § 3730(b)(1), which allows the relator to maintain the action in the name of the United States; providing, however, that the "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Id. Therefore, the United States requests that, should either the relator or the defendant propose that this action be dismissed, settled, or otherwise discontinued, this Court solicit the written consent of the United States before ruling or granting its approval.

Furthermore, pursuant to 31 U.S.C. § 3730(c)(3), the United States requests that all pleadings filed in this action be served upon the United States; the United States also requests that orders issued by the Court be sent to the Government's counsel. The United States reserves its right to order any deposition transcripts, to intervene in this action, for good cause, at a later date, and to seek the dismissal of the relator's action or claim. The United States also requests that it be served with all notices of appeal.

Finally, the United States requests that the Relator's Complaint, this Notice, and the attached Proposed Order be unsealed. The United States requests that all other papers on file in this action remain under seal because in discussing the content and extent of the United States' investigation, such papers are provided by law to the Court alone for the sole purpose of evaluating whether the seal and time for making an election to intervene should be extended.

A proposed order accompanies this notice.

Dated: August 23, 2011

Respectfully submitted,

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* * *

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

THE UNITED STATES OF AMERICA, ex rel. PETER DUPREY, and PETER DUPREY individually

Plaintiffs,

v.

HALLIBURTON, Inc., a Delaware Corporation, and KBR, Inc., a Delaware Corporation, jointly and severally

Defendants,

FILED IN CAMERA AND UNDER SEAL

Case No. PJM 07CV1487
Honorable
DO NOT RELEASE TO PRESS DO NOT ENTER ON PACER

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COMPLAINT FOR VIOLATION OF FALSE CLAIMS ACT,
31 U.S.C. § 3729 et seq.
TRIAL BY JURY REQUESTED

On behalf of the United States of America, and pursuant to 31 U.S.C. § 3730(b)(1), Relator Peter Duprey, by his attorneys, Cohan & West, P.C., and Frank, Haron, Weiner and Navarro P.L.C., bring this civil action under the False Claims Act, 31 U.S.C. 3729 et seq., and the common law theories of unjust enrichment and payment under mistake of fact, in order to recover damages and civil penalties from De-

fendants Halliburton, Inc., a Delaware Corporation, and KBR, Inc., Delaware Corporation, for their knowing submission of false claims for payment to the United States government, and therefore allege the following:

PARTIES

1. Peter J. Duprey ("Relator" or "Mr. Duprey") is a resident of the State of Alabama and a former heavy truck driver, "bob-tail" or recovery driver, and convoy commander for KBR, Inc., formerly known as Brown & Root Services, Inc., and Kellogg, Brown & Root, Inc., a wholly owned subsidiary Halliburton, Inc. Mr. Duprey worked for KBR in Iraq from March 27, 2005 to January 15, 2006.

2. Relator Duprey is an original source, having direct and independent knowledge, within the meaning of 31 U.S.C. § 3730(e)(B)(4), of the facts and information hereinafter set forth concerning the activities of the Defendants. The facts averred herein are based entirely upon his personal observation and documents in his possession.

3. In accordance with 31 U.S.C. § 3730(b)(2), prior to filing this Complaint, Relator Duprey provided to the Attorney General of the United States a written memorandum disclosing substantially all material evidence and information in his possession. This evidentiary memorandum supports the existence of fraudulent claims for payment knowingly presented to the United States by Defendants.

4. KBR, Inc. ("Defendant") is a Delaware corporation with its principal place of business at 601 Jefferson Street, Suite 3400, Houston, Texas 77002.

5. Halliburton, Inc. ("Defendant") is a Delaware corporation with its principal place of business at 5 Houston Center, 1401 McKinney Street, Suite 2400, Houston, Texas 77010.

6. The United States Army ("the Army") is a military department of the United States Department of Defense ("DoD") which is responsible for funding and administering contracts for the procurement of military equipment for its own use and for the procurement of military support services pursuant to the terms of the Logistics Civil Augmentation Program III ("LOGCAP"). The U.S. Army Materiel Command ("AMC") is responsible for funding and administering LOGCAP III, and is headquartered at 9301 Chapek Road, Fort Belvoir, Virginia 22060-5527.

7. KBR is the principal contractor for the LOGCAP III contract with offices located at 9000 Rockville Pike, TR-46F, P.O. Box 5830, Bethesda, Maryland 20892.

JURISDICTION AND VENUE

8. This action arises under 31 U.S.C. § 3729 et seq., also known as the False Claims Act (the "Act"), and the common law to recover treble damages and civil penalties on behalf of the United States of America arising out of Defendants' violations of the Act.

9. Under § 3732 of the Act, this Court has exclusive jurisdiction over actions brought under the Act. Furthermore, jurisdiction over this action is conferred on this Court by 28 U.S.C. § 1331 (1994) be-

cause this civil action arises under the laws of the United States.

10. Venue is proper in this district pursuant to § 3732(a) of the Act, which provides that "any action under § 3730 may be brought in any judicial district in which the Defendant or, in the case of multiple Defendants, any one Defendant can be found, resides, transacts business, or in which any act proscribed by § 3729 occurred." At all time material hereto, Defendants regularly conducted substantial business within the State of Maryland and maintained employees and offices in the State of Maryland, within this judicial district. Additionally, venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1)-(2).

FILING UNDER SEAL

11. Under the Act, this complaint is to he filed in camera and remain under seal for a period of at least sixty (60) days and shall not be served on Defendant until the Court so orders. The government may elect to intervene and proceed with the action within sixty (60) days after the government receives the Complaint.

12. As required by the Act, Relator Duprey voluntarily submitted, prior to the filing of this complaint, and specifically in April 2007, a report to the Department of Defense and the Department of Justice of Relator's information and good faith belief that the Defendants submitted false, fictitious and fraudulent billing statements to the United States government.

BACKGROUND

False Claims Act

13. Under 31 U.S.C. § 3729(a)(1), a person may be liable when that person knowingly presents, or causes to be presented, to an officer or employee of the United States government or a member or the Armed Forces of the United States a false or fraudulent claim for payment or approval.

14. Liability may also be found under 31 U.S.C. § 3729(a)(2) when a person knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government.

15. As defined under 31 U.S.C. § 3729(b), "knowing" and "knowingly" mean that the Defendant: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.

GENERAL ALLEGATIONS

In December 2001, KBR (known at the time as "Brown & Root Services") was awarded a contract by the U.S. Army Materiel Command to provide, inter alia, transportation and logistics support to the U.S. Military for global contingency events. KBR is the prime contractor with the U.S. Military under this contract, which is known as LOGCAP III or the Logistics Civil Augmentation Program.

17. Upon information and belief, under LOGCAP III, while a portion of KBR's performance is

to be reimbursed at a "Firm Fixed Price," the relevant portion of this contract was awarded under a "Cost Plus Award Fee" system. Such a Cost Plus contract operates by first reimbursing KBR for the total costs incurred in performance, which includes the payroll expenses for all hours worked by its employees. Secondly, KBR is awarded an additional percentage of those total costs as planned profit. There is no cap or spending limit placed on the contractor in Cost Plus contracts. Therefore, under the LOGCAP III Cost Plus contract, the greater the number of hours KBR bills to the government, the larger their percentage bonus will be. In addition, if the number of hours KBR bills to the U.S. government is fraudulently inflated (i.e. the costs for the hours billed were never incurred), then KBR receives reimbursement for costs that were never expended, plus a percentage bonus thereon.

18. Between the time the LOGCAP III contract was awarded to KBR in December of 2001 and the early months of 2003, KBR provided logistical support to various parts of the U.S. Military in Kuwait and other areas of the Middle East.

19. Since at least March 2003, trader LOGCAP III KBR has provided, inter alia, shipping and transportation support for U.S. Military operations in Iraq by operating a Division known as the Theater Transportation Mission (hereinafter "TTM").

20. The TTM Division operates out of Logistics Support Area Anaconda (a.k.a. "LSA Anaconda" or "Anaconda" or "Balad Air Base") in north-central Iraq.

21. The TTM Division includes the following shipment and transportation sections: the Flatbed section, the Refrigeration section (a.k.a. "Reefer" or "Bulkwater"), the Tanker section, the Palletized Loading section (hereinafter "PLS"), and the Heavy Equipment Transport section (hereinafter "HETS").

22. In April 2005, Relator Duprey began working for KBR in Iraq in the Flatbed section of the TTM Division.

23. Upon arrival, Mr. Duprey quickly learned that the regular timekeeping practices in the Flatbed section, as well as the other sections of the TTM Division, included the systematic and fictitious manipulation of timesheets in order to illegally inflate the hours KBR drivers worked on a daily basis.

24. KBR had an unwritten corporate policy that all TTM drivers were to enter no fewer than twelve hours of work per shift, notwithstanding the number of hours actually worked by such employees.

25. KBR had an unwritten corporate policy that TTM missions leaving LSA Anaconda ("outside the wire") were to be recorded as lasting no fewer than fourteen hours, notwithstanding the number of hours actually performed on such missions.

26. Despite official written policies to the Contrary, the unwritten corporate policy of KBR is to provide unquestioned and unscrutinized authorization for all TTM drivers to bill a minimum of eighty-four (84) hours per week, notwithstanding the number of hours actually worked.

Timesheet Completion Policies & Practices

27. In late March 2005, Relator Duprey was sent to Houston, Texas for orientation and training by KBR where he attended classes and received documents pertaining to, inter alia, KBR's "LOGCAP III Timekeeping Policy" (hereinafter "Timekeeping Policy").

28. The Timekeeping Policy, as well as the original employment contracts between KBR and Mr. Duprey, states that each driver would be guaranteed no more than 40-hours of work per week.

29. Following the completion of training in Houston, Mr. Duprey was sent to Dubai for two days prior to arrival at LSA Anaconda on or about April 11, 2005.

30. Upon arrival and prior to working a typical shift, Mr. Duprey was also trained by KBR TTM Foremen as to the importance of properly filling out one's timesheets in light of their importance as "official government documents," and the harsh consequences that would befall any KBR employee caught committing timesheet fraud.

31. Additional subsequent training seminars were held by KBR every few months for groups of TTM Division drivers in which timesheet completion procedures were reviewed.

Operational Details — Dayshift Missions

32. A standard [Flatbed Section] mission from start to finish begins the evening prior to the mission, where the KBR Convoy Commander and a KBR Foreman attend a command risk assessment

briefing with military escort personnel at which an exchange of mission route & safety information takes place.

33. According to KBR policy during the time of Relator's employment, each dayshift mission was to typically begin at 0700 hours, include a thirty (30) minute time deduction for lunch, and should conclude at 1930 hours for a total of twelve (12) hours.

34. The drivers and convoy crew will arrive at the duty location four (4) hours prior to the time designated for leaving the gate (hereinafter "SP time"), at which point convoy drivers complete a Total Safety Task Instruction (hereinafter "TSTI"), receive their truck assignments, secure their payload, and either proceed to meet the military escorts or wait for said escorts to meet the convoy.

35. Upon convergence with military escort personnel, the Convoy Commanders for the Military and KBR coordinate radio frequencies, exchange mission logs, perform battle drills, and receive a military briefing. Subsequently, the military provides the KBR Convoy Commander the final convoy clearance number, which is required for all convoys leaving the base.

36. The convoy then proceeds to the departure gate for final assembly at thirty (30) minutes prior to the SP time, and the KBR and Military Convoy Commanders coordinate mission details with the Movement Control Team (hereinafter "MCT") at LSA Anaconda, which records the exact time the convoy leaves the base. SP time is typically then confirmed, and the mission is ready.

37. Trucks operated by KBR's TTM Division are equipped with satellite data transmission uplinks manufactured and operated by Qualcomm, Inc. Upon leaving the gate, the KBR Convoy Commander is requited to enter the final SP time and other convoy details into the Qualcomm system. This data is then uploaded via satellite to KBR and Qualcomm facilities for convoy tracking purposes. The KBR Convoy Commander must also confirm the final SP time with the KBR Transportation Operations Center (hereinafter "Trans-Ops") at LSA Anaconda via radio.

38. The convoy then proceeds along the previously designated route to the mission destination. Once the convoy arrives at its destination, the Military and KBR Convoy Commanders are required to contact MCT at the destination base to inform them of the convoy's arrival. The KBR Convoy Commander also uploads convoy arrival details via Qualcomm, and also calls Trans-Ops via radio to relay that same information.

39. Records are kept for the exact time of a convoy's departure, arrival, and other designated intervals by four separate entities: the Military, MCT, Qualcomm, and KBR Trans-Ops.

40. In addition, if the mission is scheduled to remain overnight, the foregoing, steps would be followed in reverse as the convoy travels back to LSA Anaconda. If the mission is a same-day return, the Military Convoy Commander will obtain another SP time as the KBR drivers unload their payload, and the convoy then readies for the return trip.

41. Timesheets are kept by each driver throughout the week, and are subsequently turned in

to, and approved by, KBR Foremen on Saturday evenings.

Dayshift Mission Timekeeping Fraud

42. When new staff have completed their training and are brought into the TTM Division's operations in Iraq, KBR management will provide additional "guidance" as to how the employee is to fill out their timesheets.

43. For example, at the conclusion of one of his first missions, Mr. Duprey entered the six (6) hours he had worked onto a KBR timesheet. However, when Relator Duprey attempted to turn this timesheet in to his foreman, Mr. Thomas McPeek, he was told to change the hours worked to twelve (12). Mr. Duprey expressed concern regarding the propriety of entering inflated hours, but Mr. McPeek responded by saying, "What are you complaining about? I'm giving you extra hours." Mr. McPeek then proceeded to cross-out the "6" on Relator Duprey's timesheet, replacing it with a "12" while stating, "Don't put down anything less than 12 hours unless it's a sick day or you're on R&R, and then enter 8 hours." KBR Timekeeping Policy states that "[i]t is not necessary to provide an explanation for recording 12 hours or less, worked in one day."

44. Dayshift missions typically ended at 1700 hours, rather than the scheduled 1930 hours. However, it was the regular practice of drivers, convoy commanders, and foremen to include the unworked balance of the full shift time, up to 1930 hours, on their timesheets, even when completing the shift early.

45. It was, and in Relator's good faith belief, still is, the practice of the overwhelming majority of convoy commanders, upon conclusion of a mission or a shift, to loudly exclaim the number of hours they planned to enter on their timesheets. Drivers typically understood these statements to suggest that if they were to fill in their own timesheet with a slightly lower number, there would no questions asked, regardless of the amount of time they actually worked on that mission or shift.

46. While a thirty (30) minute timesheet deduction for lunch was supposed to be the norm, most dayshifts included a two (2) hour lunch break which was not deducted from the timesheet. Additionally, drivers would frequently take a two (2) hour breakfast upon arrival at the duty location while "on-the-clock."

47. In November of 2005, while Relator Duprey was working in the KBR Tasking Office he was informed by Convoy Commanders on several occasions of the two (2) hour lunch breaks their crews had taken. When Mr. Duprey inquired how that was possible with those drivers having recorded twelve (12) hours and having ended their shifts at 1700 hours, rather than the scheduled 1930 hours, he was told that those were the dayshift parameters, and if task could not be completed in conformance with those parameters, then it would not be done.

48. While standard procedure for Military escorts requires that the escorts rendezvous with their assigned convoy no less than 2 hours prior to the final SP time, KBR convoy commanders typically add unnecessary hours to the time their crew begins preparations for the mission.

49. For example, on December 23, 2005, KBR Convoy Commander Elizabeth Price had her crew arrive at the staging area at 0730 hours to prepare for a mission that had a scheduled SP time of 1220 hours. Since a mission to forward operating base (FOB) Speicher, as well as the return trip, are typically completed in far less than a day, and because this is a relatively common trip for the TTM Division that involves merely dropping off the loaded trailers and hooking up to an empty trailer for the return trip (a.k.a. "drop and hook"), a five (5) hour staging and preparation time was not necessary. This early staging time was used for the sole purpose of inflating the hours worked by each of the twenty-two (22) drivers and staff on the mission.

50. KBR managers did not question the unnecessary hours for all the drivers on this particular occasion, nor would they question any lengthy staging time, because it provided additional justification for inflating each driver's hours on that day's timesheets to twelve (12), despite the fact that this routine trip was completed in significantly less time. Such practices are standard operating procedure and are approved without question by KBR management.

51. Fellow KBR employee Edward Dinnan felt ill during one particular day of work and decided to visit the medic prior to the official end of his shift. While Mr. Dinnan told Foreman McPeek that he had worked only eight (8) hours that day, Mr. McPeek told him to write down twelve (12) hours anyway, because he had already worked part of the day, and didn't take the whole day off as a sick day.

52. Throughout the duration of his time as an employee of the KBR TTM Division in Iraq, Mr.

Duprey witnessed systematic timesheet fraud during the day and night shifts occurring on a daily basis, notwithstanding these written policies and in direct contravention thereof.

53. Despite the training guidelines and policies given to employees, KBR did not, and in Relator's good faith belief, does not, strictly enforce compliance with the Timesheet Policy at the receiving bases, allowing the convoy drivers to enter their own hours on their timesheets without scrutiny.

54. Enforcement compliance with the Timesheet policy would not be particularly onerous or complicated, and would simply require one to compare each KBR timesheet with the Military, Qualcomm, or MCT mission data that was relayed as the convoy departed or arrived at a particular base.

55. As there is no scrutiny or comparison of the KBR convoy timesheets with the mission departure data relayed through the Military, MCT, or Qualcomm systems, KBR Foremen and Convoy Commanders routinely, and as a matter of standard operating procedure, ensure that each driver enters a minimum of twelve (12) hours for each mission.

56. As a result, while drivers typically worked an eight (8) hour day, the timesheet would include twelve (12) hours worked for each driver.

57. Despite the widespread nature of the timesheet fraud alleged in the within action, which was also reported internally within KBR on numerous occasions by Relator Duprey, to Relator's knowledge no such enforcement efforts have been made. As a result, whether due to actual knowledge and complicit acceptance, deliberate ignorance, or

reckless disregard of the regular and systematic fraudulent timesheet completion practices of the TTM Division, KBR management has allowed such practices to continue unabated and without scrutiny, while reaping the financial benefits thereof under the LOGCAP III Cost Plus contract.

58. The Flatbed section alone is normally comprised of approximately 190-200 drivers at any one time, with each driver routinely over-billing in accordance with this procedure.

59. This fraudulent timekeeping and billing procedure ensures that each KBR driver receives the maximum amount of weekly pay without routinely exceeding 100 hours per week, which is considered a level that could "set off alarms." Because most KBR Foremen and Convoy Commanders are former drivers, and because of the financial rewards given to drivers under this procedure, this fraudulent timekeeping and billing procedure produces an institutionalized incentive to systematically defraud the United States government.

60. Based upon information and belief, these fraudulent dayshift timekeeping and billing practices continue to occur to this day.

61. In addition, because it is KBR's practice to occasionally transfer truck driving staff between Iraq, Kuwait, and Afghanistan, it is the good-faith belief of Relater Duprey that these particular fraudulent timekeeping and billing practices are commonplace throughout KBR's operations in Iraq, Kuwait, and Afghanistan.

62. By communicating these fraudulent timekeeping and billing practices and the means to

discover them (via comparison of the KBR Timesheets with MCT & Qualcomm convoy data) to the U.S. government, Mr. Duprey believes that additional instances of such fraudulent billing practices by KBR can be uncovered throughout Iraq, Kuwait, Afghanistan, and the entire Middle East theater of KBR's operations.

Operational Details — Dayshift at LSA Anaconda

63. On days spent "behind the wire," during which KBR drivers did not have a scheduled mission which would leave LSA Anaconda, the shift time was scheduled to begin at 0700 hours and end at 1930 hours.

64. As previously outlined for Dayshift Missions, on-half hour was to be deducted for lunch, and the rest of the time was to be worked completing tasks within the KBR area at LSA Anaconda. These tasks ranged front preparing, loading and unloading cargo onto trucks to picking up cigarette butts around the yard.

Timekeeping Fraud — Dayshift at LSA Anaconda

65. Relator Duprey witnessed timesheet billing fraud on a regular basis during dayshifts spent "behind the wire."

66. The typical schedule for TTM Division drivers and crews would begin with breakfast from 0700 hours to 0900 hours. This meal "on-the-clock" was followed by the completion of some task from 0900 hours to 1100 hours. Lunch would be taken

from 1100 to 1300 hours. The time from 1300 hours to 1700 hours would occasionally be spent by drivers completing tasks, but, more frequently, drivers spent this time in their personal living quarters or elsewhere, without assignment of a task or any corresponding supervision. Drivers expected to be allowed to be released for the day at 1700 hours, and would frequently complain if made to stay past that time.

67. In sum, most drivers were typically not working eight (8) hours each day.

68. Mr. Duprey witnessed the foregoing daily schedule take place as a matter of routine practice. Nevertheless, each driver or crew member would fill in twelve (12) hours worked for such a shift. Drivers that were angry at having been made to work past 1700 hours would typically put down greater than twelve hours.

69. On average, thirty (30) drivers were stationed at Anaconda during the dayshift on a given day, with some fluctuation due to mission requirements. If thirty (30) drivers claim roughly four (4) hours of fictitious work on their timesheets per dayshift, the total number of fraudulently billed hours for that shift equals 120.

70. Due to the complicit failure of KBR management to verify or scrutinize the timesheet logs for dayshift operations behind the wire, such fraudulent billing practices were a regular and systematic procedure in the TTM Division.

Operational Details & Timekeeping Fraud — Nightshift

71. Nightshift timesheets were also routinely falsified to include more hours than were actually worked, resulting in unsubstantiated and improper billing.

72. Between June 4, 2005 and August 22, 2005, Mr. Duprey worked exclusively at night.

73. According to KBR policy, each nightshift mission begins at 1900 hours, includes a thirty (30) minute time deduction for midnight chow, and concludes at 0700 hours.

74. While working the nightshift Mr. Duprey worked past 0100 hours on only one occasion.

75. KBR employees were routinely released to their living quarters at 0100 while "working" the nightshift.

76. Due to a lack of work, KBR employees working the nightshift were typically instructed to keep their radios on while at their living quarters.

77. KBR nightshift employees were typically given a two (2) hour midnight chow that was not deducted from the timesheet.

78. KBR nightshift employees routinely worked roughly four (4) to five (5) hours.

79. Timesheets for KBR nightshift employees nonetheless state that twelve (12) hours of work was completed by each employee.

80. Mr. Duprey witnessed the foregoing nightshift schedule take place as a matter of routine practice.

81. On average, thirty (30) drivers were stationed at Anaconda during the nightshift on a given night, with some fluctuation due to mission requirements. If thirty (30) drivers claim roughly six (6) hours of fictitious work on their timesheets per nightshift, the total number of fraudulently billed hours for that shift equals 180.

82. As previously stated, KBR institutionalized these fictitious timekeeping methods in order to increase profit under the "Cost Plus" contract resulting in gross over-billing lot services not rendered.

83. Based upon information and belief, these fraudulent nightshift timekeeping and billing practices continue to occur to this day.

PARTICULAR INSTANCES OF FRAUD

Drivers with Suspended Licenses

84. KBR Drivers who have had their heavy truck driving license suspended or revoked during their employment with KBR are not supervised, and are allowed to remain in-country and to submit timesheets for work that they did not complete.

85. During Relator's employment and initial training in Iraq, one of his fellow KBR drivers was named Dennis Sharpin.

86. During the initial training for heavy truck drivers in Iraq, several other drivers informed management that it seemed clear to them that Mr. Sharpin was physically unfit to operate the trucks effectively and to carry out the responsibilities of a heavy truck driver.

87. Mr. Sharpin was permitted to complete the training. However, shortly thereafter, in May of 2005, Mr. Sharpin was involved in a rear-end collision with a loaded truck in front of him.

88. This collision totaled his truck, and also heavily damaged the Schmitz trailer with which he collided. He was not terminated, and the paperwork from his initial investigation was lost, so the only repercussion was that Mr. Sharpin had his license suspended.

89. As a result of his suspension, Mr. Sharpin was not allowed to participate in missions leaving LSA Anaconda from May 2005 to September 2005 while the KBR Accident Review Board considered his case. While Mr. Sharpin would periodically arrive in the morning with crews that were preparing for work, he also did not participate in any of the tasks assigned to drivers who were working behind the wire during that time.

90. Although Mr. Sharpin was not driving on missions during this period, he regularly submitted timesheets claiming 84 hours of work as a heavy truck driver.

91. In September 2005, Mr. Sharpin's accident review hearing took place, during which he was informed that his driving privileges had been permanently revoked, and that he could either find a new job within two (2) weeks or be sent back to the U.S.

92. Rather than being terminated as per KBR policy, despite his costly accident, as well as his continual submission of timesheets showing a maximum of hours worked throughout his suspension, Mr. Sharpin was eventually transferred to his current po-

sition at the Joint Distribution Center (JDC) by KBR Supervisor of Transportation, Mr. Billy Turner.

93. KBR heavy truck driver Shannon Conrad also had his license suspended for jackknifing a trailer during a mission in Iraq in late 2005.

94. As with Mr. Sharpin, upon receiving a suspension of his license Mr. Conrad repeatedly failed to participate in any work projects at Anaconda while still filling out timesheets as if he were a heavy truck driver.

95. Mr. Duprey wrote up disciplinary papers for Mr. Conrad's failure to show up for work on two separate occasions. However, Mr. Duprey's foreman told Mr. Duprey to "back off," and that he had the situation "handled." Mr. Conrad was allowed to take a temporary leave, and was subsequently granted the ability to return to his original job.

Winters Incident

96. Convoy commanders have both operational and administrative responsibilities over each mission, and consequently they are expected to begin a shift prior to commencement by their subordinates, and to end a shift after their subordinates conclude in order to fulfill those additional responsibilities.

97. Mr. Duprey, however, witnessed several instances in which fellow driver Michael Winters submitted timesheets with more hours worked than the Convoy Commander on his mission.

98. On both August 7th and 8th, 2005, Mr. Winters recorded 14 hours, while Convoy Commander Buddy Smith recorded only 13 hours.

99. Mr. Duprey was the "Bob-tail," or recovery driver, for Mr. Smith's convoys for the three weeks in which these events took place.

100. For the 7th and 8th of August, the crew never left Anaconda, so Mr. Winter's timesheet included two additional fraudulent hours.

101. Neither Mr. Smith, nor anyone in TTM management scrutinized these timesheets or questioned Mr. Winters as to why he submitted more hours worked than the Convoy Commander.

Bunker Time

102. An additional method of timekeeping fraud employed by drivers such as Michael Winters takes advantage of the fact that KBR employees are paid for the time in which they are sitting in a bunker to avoid mortar or other attacks on their base.

103. Mr. Winters made it a regular practice to write down any time he heard a mortar fired while he was not otherwise working on the base, even and especially at night. Despite not actually traveling to the bunker, Mr. Winters regularly recorded "Bunker Time" for mortars tired at the base in order to increase his pay.

104. KBR management approved Mr. Winters' timesheets including such "Bunker Time" without scrutiny or question.

Reefer/Bulkwater

105. Relator Duprey also witnessed systematic and unscrutinized timesheet fraud in the Reefer/Bulkwater Section of the TTM Division.

106. While extremely limited in the number of missions this Section performed on a weekly basis, the Foremen in this Section routinely permitted the drivers to submit timesheets with 84 hours of work per week.

Crewflopping

117. "Crewflopping" occurs when drivers working either the day or nightshift have to be rotated in order to cover mission requirements.

108. KBR Timekeeping Policy states that drivers are to clock their hours according to and during the calendar day in which they were worked. For example, "if a mission started at 0000 on a Monday, 25 February and did not finish until 0200 on Tuesday, 26 February, then you would record 24 hours for that Monday, 25 February, and 2 hours of that mission's time would be recorded on Tuesday, 26 February."

109. When a crew returned from a mission in the early morning hours, they would typically be scheduled to work the night shift later that day, giving them time to rest in their personal quarters. However, on occasion such a crew was "flopped," or rotated to work the dayshift of the following morning, twenty-four (24) hours later, instead of the nightshift of that evening. Typically, when a crew was flopped they would not report for the evening nightshift, and would plan to report for duty the following morning. Therefore, that crew would have worked the number of hours it took to complete their previous nightshift's mission and then no other hours that day.

110. As a result, since the night shift ends at 0700 hours, the maximum hours a TTM Division driver would have worked that day would be seven (7)— from midnight to the end of their nightshift in the early morning, not later than 0700 hours. Despite being "flopped" and not reporting for duty until the following morning, drivers were routinely permitted to sign timesheets logging twelve (12) hours for those days.

111. Upon information and belief, this fraudulent timekeeping practice occurs to this day.

Joint Distribution Center (JDC)

112. Convoys returning to Anaconda will typically have trailers that fall into one of three categories: (1) empty; (2) loaded with materials pursuant to a Transportation Movement Request (TMR); or (3) loaded with materials destined for Kuwait (known as "Retro").

113. A TMR is a document typically used to request the transfer of vehicles or supplies from one base to another.

114. There are standard procedures that each class of trailer follows upon returning to Anaconda. All trucks and trailers first proceed to an inspection station.

115. Empty trailers are sent directly to the JDC yard, where drivers drop their empty trailer, return their truck to the TTM yard, park their bobtails, and then turn in their paperwork prior to being released.

116. Convoy trucks returning with TMR materials destined for Anaconda follow a similar procedure as the empty trailers, simply dropping their TMR-loaded trailers in the TTM yard, parking their bob-tails, and turning in their paperwork.

117. However, convoy trucks returning with "Retro" supplies bound for Kuwait are required to undergo inspection at the JDC yard, then proceed to the staging lanes to unstrap and unchain their payload, and then proceed to the downloading area of the JDC yard and unload their payload materials. Following the completion of the unloading process, the drivers had to drop their empty trailers at the JDC yard, park their bob-tails back in the TTM yard, and turn in their paperwork. All of this extra work typically took an additional one and one half (1.5) to three (3) hours to complete, depending on how busy the JDC yard was at the time.

118. As a matter of routine practice, Convoy Commanders would not record the time at which each individual driver completed their work for the day on the Convoy Commander's Mission Log. This complicit failure to record the time each individual driver was done allowed all drivers to consider the mission ended when the last driver had finished unloading. Therefore, all drivers were encouraged or allowed to include the additional time necessary for last driver to complete the unloading of the Retro supplies on their timesheet, notwithstanding the fact that the initial driver had completed his work and was released from further responsibility hours prior to that last driver.

119. It was the regular and routine practice of KBR Convoy Commanders to summarily approve

all timesheets including the hours worked by those drivers preparing a Retro shipment, regardless of whether a driver had worked that additional time.

120. Based upon information and belief, this practice continues to occur to this day.

January 2006 Speicher & Seitz Missions

121. On January 12, 2006, Convoy Commander Marc Kenyon supervised a mission from LSA Anaconda to forward operating base (FOB) Speicher.

122. This particular convoy was loaded with a type of trailer that could not simply be left at the base, so the crew had to remain overnight at FOB Speicher, with plans to return to LSA Anaconda the next day, January 13th, 2006.

123. Mr. Kenyon's convoy arrived at Anaconda at 1330 hours, having met their military escorts at 1000 hours and leaving FOB Speicher at 1100 hours.

124. At the time Mr. Kenyon's convoy returned to Anaconda, Mr. Duprey was loading and preparing his own convoy for a trip to another base, Q-West, the next morning. However, while it was 1330 hours and Mr. Kenyon's crew had only been working since 1000 hours that morning, roughly 4 hours, KBR Transportation Supervisor Winfred Walker informed Mr. Duprey that Mr. Kenyon's twenty-three (23) member crew would be given the rest of the afternoon off to rest for their mission the next morning, January 14th, and then ordered Mr. Duprey's crew to off-load Mr. Kenyon's equipment.

125. Consistent with KBR's unwritten corporate policy of logging twelve (12) hours worked per

day, and despite having only actually worked four (4) hours total on January 13th, from 1000 hours to 1400 hours, all twenty-three (23) crew members with Mr. Kenyon's mission logged twelve (12) hours on their timesheets for that day.

This particular instance of timesheet fraud resulted in KBR charging the government eight (8) unworked hours for each of the twenty-three (23) crew members; a total of 184 fictitious and fraudulently billed hours.

126. In addition, on the morning of January 13th, at the TSTI at 0700 hours, Foreman Doug Ramos asked for ten (10) volunteers to drive a mission to Seitz later that evening.

127. These volunteer drivers would not be required to report back for work until 1700 hours, and so those drivers were released to their quarters until that time.

128. The Seitz mission left and returned on schedule, with work concluding just before 2400 hours that night; a total of 7 hours. However, all ten (10) drivers wrote twelve (12) hours on their timesheets, five (5) of which had not actually been worked.

129. As a result, fifty (50) fraudulent hours ware billed to the government without having been worked.

130. Therefore, on January 13th, 2006, these two missions alone resulted in KBR fraudulently billing a total of 234 fictitious hours to the U.S. government.

Relator's Internal Reporting of Fraudulent Timekeeping Practices

131. The KBR Code of Business Conduct, pursuant to "Corporate Policy 3-0015," directs that "[a]ny Director, employee or agent who suspects that any fraudulent activity may have occurred is required to report such concern to the Law Department, Audit Services, Security Department, or the Company's Chief Financial Officer."

132. In September of 2005, Relator Duprey was given an in-country training in September of 2005, reiterating the terms of the KBR Code of Business Conduct with particular attention paid to the timekeeping practices of the TTM Division.

133. In keeping with these policies and guidelines, and in addition to his initial complaint to Foreman McPeek, while working for KBR in Iraq Mr. Duprey also filed complaints and a detailed three (3) page report documenting the improper billing to Foremen Homer Avalos, Stephen Riddle, Bob Keady and Doug Ramos.

134. The responses Mr. Duprey typically received from these Foremen were to the effect that as long as each driver's hours are below 100 for the week, no one would question it.

135. In addition, in November 2005 Mr. Duprey complained on two separate occasions to KBR Project Controls employee Kirk Hansen.

136. Mr. Hanson, one of the last management officials at LSA Anaconda to view TTM timesheets, replied that he knew that something was going on because "missions were down and hours were up."

137. Ultimately, however, Mr. Hansen stated that he was unable to do anything about it and that Mr. Art Lange, KBR Project Manager, was in charge of everything. However, Mr. Hansen cautioned Mr. Duprey that if he intended to continue asking questions about these fraudulent billing practices, "You'd better grow eyes in the back of your head."

138. As Convoy Commander, Mr. Duprey filed a complaint regarding fellow employee Shannon Conrad, who had his license pulled and subsequently stopped showing up for work at all. Upon receipt of Mr. Duprey's complaint, the Foreman told him to "back off."

139. During his nine (9) months with KBR, Mr. Duprey knew of no driver who was fired or otherwise disciplined for timesheet fraud.

140. Ultimately, Mr. Duprey reported the fictitious timekeeping practices to Brigitte Fisher, KBR Human Resources Manager at LSA Anaconda.

141. Ms. Fisher advised Mr. Duprey that, for his own personal safety, he should not discuss the matter while he was still in Iraq.

142. Subsequently, and despite wanting to continue his employment with KBR, Mr. Duprey felt it was necessary to immediately request that he be allowed to "de-mobilize" (or "demob") and to leave Iraq prior to the scheduled conclusion of his employment with KBR.

143. Mr. Duprey only sought demobilization due to his good faith belief that his safety was compromised due to his reporting of the timesheet fraud.

144. Mr. Duprey returned to the United States on January 15, 2006.

145. The next day, January 16th, 2006, Mr. Duprey called the number for the Halliburton/KBR Code of Business Conduct Hotline provided in his training materials to file another complaint.

146. During his call to the Halliburton/KBR Code of Business Conduct Hotline, Mr. Duprey spoke with a woman for roughly thirty (30) minutes and was given an internal report number, No. 601160516, after which the woman stated that she was "going to pass it on."

147. Roughly two weeks later, Mr. Duprey contacted the Code of Business Conduct Hotline once again, and was referred to the office of KBR Attorney Richard Mize. An assistant to Mr. Mize referred Mr. Duprey to Kerry Miller in the KBR Security Department in Washington, D.C., and Mr. Duprey forwarded a letter to Mr. Miller detailing some of the fraudulent practices he witnessed while working for KBR in Iraq.

148. In mid-February, Mr. Duprey contacted Jim Coin, Manager of KBR Employee Relations, in an attempt to resolve the issue internally, and to be rehired with KBR.

149. Mr. Duprey recalls that nearly each person with whom he discussed this matter stated to him that he was "doing the right thing."

150. Ms. Fisher contacted Mr. Duprey in March 2006 from Iraq, informing him that Peter Agustin of KBR's Iraq Investigative Office wanted to contact him regarding the complaint.

151. Mr. Agustin and Mr. Duprey corresponded via email and Mr. Duprey relayed some of the information he had in his possession regarding the timesheet practices of the TTM Division.

152. In June of 2006, Mr. Duprey was contacted by William Rice, International Investigations Manager for KBR, requesting a July meeting, in person, at a date, time, and location of Mr. Duprey's convenience. Following Mr. Duprey's reply, contact with Mr. Rice ceased.

153. While Mr. Duprey was pursuing these internal reporting procedures, Mr. Edward Dinnan remained an employee with KBR in the Flatbed Section, and then in the trailer inspection yard of the TTM Division.

154. Despite the apparently ongoing internal investigations or false and fictitious billing practices in the TTM Division by the investigatory divisions of KBR, ostensibly as a result of Mr. Duprey's actions in the United States, Mr. Dinnan continued to witness regular and systematic fraudulent timekeeping, as documented above, through to the end of his twenty-two (22) month employment with KBR on February 21, 2007.

155. On one occasion Mr. Dinnan was contacted by Mr. Agustin and asked to gather drivers and other KBR employees willing to testify to the fraudulent timesheet billing practices.

156. Mr. Dinnan communicated the procedure described above for uncovering and tracking timesheet fraud; however, Mr. Agustin stated that "he didn't have the resources to investigate, as it would be too long and tedious."

157. Mr. Agustin asked Mr. Dinnan to investigate on his behalf, and to find drivers and other KBR employees willing to testify to the TTM Divisions' systematic timesheet fraud.

158. Mr. Dinnan discussed the fraudulent timekeeping procedures with Foreperson, Nancy Chamberlain, who stated that she was willing to testify that there was an unwritten KBR policy of allowing drivers to record twelve (12) hours on their timesheets while knowing that those hours were not worked.

159. Mr. Dinnan later learned that Mr. Agustin intended to interview Nancy Chamberlain, Driver Mike Winters, Convoy Commander Mark Kenyon, and Foreman Doug Ramos.

160. Despite the apparently ongoing investigations, Mr. Dinnan witnessed no additional efforts to investigate or curtail the fraudulent billing practices of the TTM Division throughout the duration of his employment with KBR.

161. In his attempts to follow the training he was given in both his original Houston training and his subsequent in-country refresher course, Relator Duprey sought to internally resolve all issues with respect to the timekeeping practices he witnessed.

162. KBR's unwillingness to follow their own internal guidelines and procedures with respect to internal reporting of allegations of fraud and abuse demonstrates, at a minimum, and in conformity with the requirements of 31 U.S.C. § 3729(b), a "reckless disregard or deliberate ignorance" of the fact that timesheet reporting fraud was occurring within the TTM Division.

163. The facts and institutionalized procedures delineated by Mr. Duprey above demonstrate that management officials in Iraq and investigatory officials throughout the KBR corporate structure in Iraq, Dubai, and the United States, knew or had reason to know of KBR's false, fictitious and fraudulent billing practices, as well as the subsequent submission of said bills to the United States government for payment, yet failed to take steps to ensure that the practice was halted.

Summary

164. Due to the nature of the LOGCAP III "Cost-Plus" contract KBR entered into with the U.S. DoD, KBR receives both a greater cost-reimbursement figure, and a greater profit calculation based on those costs, if the hours worked by its employees are illegally inflated.

165. Defendants made (and unless otherwise noted, Relator Duprey believes are still making) numerous false claims and have committed numerous fraudulent acts involving the knowing submission of false, fictitious and fraudulent billing statements to the United States government by creating and fostering improper billing practices which involved, inter alia, the following:

a. Institutionalizing the practice of logging unsubstantiated and false statements of the hours worked by KBR truck drivers pursuant to an unwritten corporate policy requiring each driver to log no less than twelve (12) hours per day, absent exigent circumstances, notwithstanding the number of hours actually worked by such drivers;

b. Institutionalizing an unwritten corporate policy in which KBR managers permitted the submission of employees' timesheets without monitoring or scrutiny;

c. Failing to adequately investigate and correct the foregoing fraudulent billing practices after being made aware of serious and well-documented allegations of significant over-billing.

166. KBR's practices have caused the United States government to pay out sums to KBR which KBR was not entitled to receive. This conduct by KBR constitutes the submission of a false claim for payment within the meaning of the False Claims Act, 31 U.S.C. § 3729.

COUNT I
FALSE CLAIMS ACT
PRESENTATION OF FALSE CLAIMS

167. Relator Duprey re-alleges and incorporates paragraphs 1-166 of this Complaint as if fully set forth herein.

168. In performing the acts described above, Defendants through their own acts or through the acts of their officers, knowingly presented, or caused to be presented, to an officer or employee of the United States government, false or fraudulent claims for payment or approval in violation of U.S.C. § 3729(a)(1).

169. The United States, unaware of the foregoing circumstances and fraudulent conduct of the Defendants, made full payments, which resulted in its being damaged in an amount to be determined.

COUNT II
FALSE CLAIMS ACT
FALSE STATEMENTS

170. Relator Duprey re-alleges and incorporates paragraphs 1-169 of this Complaint as if fully set forth herein.

171. In performing the acts described above, Defendants through their own acts or through the acts of their officers, knowingly made, used, or caused to be made or used, a false record or statement to get false or fraudulent claims paid or approved by the Government in violation of 31 U.S.C. § 3729(a)(2).

172. The United States, unaware of the foregoing circumstances and fraudulent conduct of the Defendants, made full payments which resulted in its being damaged in an amount to be determined.

COUNT III
UNJUST ENRICHMENT

173. Relator Duprey re-alleges and incorporates paragraphs 1-172 of the Complaint as if fully set forth herein.

174. This is an action to recover monies by which Defendants have been unjustly enriched. Due to the Defendant's fictitious and fraudulent practices, the United States paid monies by which Defendants have been unjustly enriched.

175. By reason of their payments, the United States government is entitled to damages in an amount to be determined.

COUNT IV
FAYMENT UNDER MISTAKE OF FACT

176. Relator Duprey re-alleges and incorporates paragraphs 1-175 of the Complaint as if fully set forth herein.

177. This is an action to recover monies paid by the United States government under a mistake in fact that was caused by Defendants through the activities described in this Complaint.

178. The United States government made payments to KBR for military logistics support provided by the TTM Division under the erroneous belief that the timekeeping records, billing statements, and proposed amounts upon which reimbursement was based were true, correct, and proper.

179. The federal government's erroneous belief was material to the payments made by the United States.

180. Because of these mistakes of fact, the United States government paid moneys for military logistics support that were not properly reimbursable and to which the United States government is entitled.

181. By reason of these payments, the United States government has suffered damages in an amount to be determined.

PRAYER FOR RELIEF

WHEREFORE, Relator respectfully requests that this Court enter judgment against Defendants as follows:

a. That the United States be awarded damages in the amount of three times the damages sustained by the United States because of the false claims and fraud alleged in this Complaint, as the Civil False Claims Act, 31 U.S.C. § 3729 et seq. provides;

b. That civil penalties of $5,500 to $11,000 be imposed for each and every false claim that Defendants caused to be presented to the United States;

c. That pre- and post-judgment interest be awarded, along with reasonable attorneys' fees, costs, and expenses which Relator necessarily incurred in bringing and pressing this case;

d. That Relator be awarded the maximum amount allowed pursuant to the False Claims Act;

e. That this Court award such other and further relief as it deems proper.

DEMAND FOR A JURY TRIAL

Relator Duprey hereby demands a jury trial on all claims alleged herein.

Respectfully Submitted,
COHAN & WEST, P.C.

Dated: June 5, 2007. /s/ Robin Page West

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Dated: June 1, 2007. FRANK, HARON, WEINER AND NAVARRO

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APPENDIX K

Calendar No. 899

110TH CONGRESS *2d Session* } SENATE { REPORT 110-431

WARTIME ENFORCEMENT OF FRAUD ACT OF 2008

July 25, 2008.—Ordered to be printed

Mr. Leahy, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2892]

The Committee on the Judiciary, to which was referred the bill (S. 2892), to promote the prosecution and enforcement of frauds against the United States by suspending the statute of limitations during times when Congress has authorized the use of military force, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

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I. Background and Purpose of the Wartime Enforcement of Fraud Act of 2008

On April 18, 2008, Chairman Patrick Leahy introduced the Wartime Enforcement of Fraud Act of 2008 (WEFA), which was cosponsored by Senator Grassley. Senators Obama, Byrd, and Cardin have since joined as cosponsors. This legislation will protect American taxpayers from criminal contractor fraud by giving investigators and auditors the time they need to thoroughly review contracts related to the ongoing conflicts in Iraq and Afghanistan.

The legislation makes current law extending the statute of limitations during wartime applicable to the conflicts in Iraq and Afghanistan. It amends the Wartime Suspension of Limitations Act (18 U.S.C. 3287) to apply not only when the United States is engaged in a declared war, but also when Congress has authorized the used of military force pursuant to the War Powers Resolution (50 U.S.C. 1544(b)). The legislation also extends the statute of limitations to five years after the end of a conflict, making the law consistent with the current statute of limitations for criminal fraud offenses. See 18 U.S.C. Sec. 3282(a).

A. Background

War contracting fraud and efforts to combat it have a long history in this Nation. During World War II, President Franklin Delano Roosevelt spoke out against "war millionaires" who made excessive profits exploiting the calamity of war, and President Harry S. Truman, when he served in the Senate, crossed this country holding now-famous public hearings to expose gross fraud, waste and abuse by military contractors. In 1942, President Roosevelt signed into law the Wartime Suspension of Limitations Act, which extended the time prosecutors had to bring charges relating to criminal fraud offenses against the United States.[1] Recognizing the extreme difficulty in tracking down contracting fraud in the midst of a war, Congress unanimously approved the 1942 law, which temporarily suspended the statute of limitations. In 1948, President Truman signed a new law making this change permanent. The Wartime Suspension of Limitations Act proved to be vital in pursuing war profiteers, as prosecutors used the law to pursue contracting fraud after the war was over.[2]

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[1] A similar provision was passed after World War I, extending the statute of limitations for conspiracy to defraud the Government from three years to six years. Congress recognized that war contracts required "the most minute investigation" and wanted to provide prosecutors with the time necessary to discover fraud. H.R. Rep. No. 67-365, at 1 (1921). Congress restored the three-year statute of limitations after the war once the Department of Justice announced that it did not plan any further prosecution of contracting fraud related to World War I.

[2] For example, this extension of the statute of limitations allowed prosecutors to secure a 79-count indictment against a subcontract employee who for three years falsified payroll records to bill the government for the hours worked by nonexistent

In recent years, war contracting fraud has again plagued this Nation during the engagement of U.S. forces in Iraq and Afghanistan. Congress has appropriated more than $500 billion to date for the wars in Iraq and Afghanistan, including more than $50 billion for relief and reconstruction activities. The investigations and audits conducted so far have uncovered how billions in taxpayers' money has been lost to contract fraud, waste, and abuse. The Department of Justice, however, has only initiated a few cases involving less than $30 million lost to fraud, while hundreds of investigations into contracts worth billions remain pending, and new investigations based on allegations of fraud are started every month. Unless the statute of limitations is extended, these investigations may well be shut down before they can be completed and wartime fraud will go unpunished.

Private contractors have been used to a greater extent during these war-time activities than at any time in our history. The exigencies of war overseas, however, make oversight of these contractors more difficult, and expenditures are often made with fewer audit and other controls than during normal Government procurement. Often, the Government does not learn about serious fraud until years after the fact. As a result, the provision of goods and services during these military actions, as well as during relief and reconstruction activities, are more vulnerable to acts of fraud and abuse.

Hearings in both the Judiciary and Appropriations Committees have highlighted the difficulty of

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employees. See *United States v. Agnew*, 6 F.R.D. 566 (E.D.Pa. 1947).

conducting investigations and audits into contracting fraud as the war is ongoing.[3] Inspectors General from the Defense Department, the State Department, and other agencies, as well as the Special Inspector General for Iraq Reconstruction (SIGIR), have consistently indicated that ongoing hostilities in Iraq and Afghanistan have significantly hampered their ability to review contracts and pursue investigations. For example, an audit by the Department of Defense Inspector General in May 2008 found that more than 90 percent of the $8.2 billion spent on contractors in Iraq lacked adequate documentation, and the DoD IG is still in the process of auditing billions spent on these contracts. Similarly, a separate SIGIR audit of a $1.2 billion State Department contract for security services in Iraq had to be stopped because Government and contractor officials could not find the invoices and documents showing how the money was spent. The State Department estimates it will take three to five years to find and organize the documentation for this contract, just for the audit to be completed. At this point, billions of dollars are unaccounted for, and it will take years to fully investigate and audit these expenditures for fraud.

In response to this problem, the Deputy Secretary of Defense Gordon England and the Acting Defense

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[3] See Senate Judiciary Committee Hearing, "Combating War Profiteering: Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq" (March 20, 2007); Senate Appropriations Committee Hearing, "The Effectiveness of U.S. Efforts to Combat Corruption, Waste, Fraud and Abuse in Iraq (March 11, 2008); Senate Appropriations Committee, "Oversight Hearing on Fraud, Waste, and Abuse in Defense Department Contracts Supporting Activities in Iraq and Afghanistan" (July 23, 2008).

Department Inspector General Gordon Hedell testified before the Senate Appropriations Committee on July 23, 2008 that the bill would help them complete their oversight of Iraq war contracts, and they both supported the bill.[4]

B. Need For Legislation

While the World War II provision suspending the statute of limitations is still the law today, it applies only "when the United States is at war." 18 U.S.C. Sec. 3287. As a result, the ongoing military operations in Iraq and Afghanistan are likely exempt from this law because they were undertaken when Congress authorized the use of military force, rather than by a formal declaration of war.

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[4] In their views, Senators Sessions and Coburn express concern that "the Department of Defense should weigh in before the Senate considers the bill" and the legislation needs to be studied further. In their testimony before the Appropriations Committee, the Deputy Secretary of Defense and the Defense Department Inspector General both weighed in supporting the bill. In addition, Senators Sessions and Coburn claim that in passing the Wartime Suspension of Limitations Act in 1942 and 1948, Congress "intentionally limited" the law to declared wars, not authorizations for the use of military force. Since the War Powers Resolution, which allows for congressional authorizations for the use of military force, was not passed until 1973, nearly three decades after the Wartime Suspension of Limitations Act, this contention is dubious at best. Even if there were anything to this claim, that does not preclude this Congress from doing the right thing and extending the wartime suspension of statutes of limitations to war zones created by authorizations for the use of military force. The point of the Wartime Suspension of Limitations Act and this bill is the same, to ensure that the fog of war does not allow those who defraud the United States from getting away with it because their actions could not be investigated during hostilities.

The Wartime Enforcement of Fraud Act of 2008 (WEFA) would correct this problem and extend the statute of limitations when Congress has authorized the use of the Armed Forces pursuant to the War Powers Resolution, as well as during declared wars. The legislation would make three changes to current law.

First, it would extend the statute of limitations when Congress enacts a specific authorization for the use of the Armed Forces consistent with the War Powers Resolution. In doing so, this language would apply current law to the ongoing conflicts in Iraq and Afghanistan, and to similar actions in the future. This amendment is not intended to apply to peacekeeping missions under the auspices of the United Nations, or military actions not specifically authorized by Congress pursuant to the War Powers Resolution. This will give investigators and auditors additional time to thoroughly review all war contracts and bring those who have defrauded the American taxpayers to justice.

Second, the legislation would extend the statute of limitations for five years after the end of the conflict, updating the provision to be consistent with the general statute of limitations for criminal offenses. See 18 U.S.C. Sec. 3282(a). The statute of limitations for criminal fraud offenses was only three years when the law was passed during World War II, but is five years today.[5]

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[5] Pub. L. No. 870-299, 68 Stat. 1145 (1961) amended 18 U.S.C. 3287 to change the statute of limitations to five years for noncapital offenses.

Third, it makes clear that a presidential proclamation ending hostilities, and thus ending the tolling of the statute of limitations period, must be a formal proclamation with notice to Congress. This will provide a clear point in time at which the statute of limitations will begin to run, providing certainty to courts, prosecutors, and litigants interpreting this provision.

Now, more than five years after the start of the Iraq war and nearly seven years after the beginning of the Afghanistan war, the statute of limitations has started to bar criminal actions in investigations of contracting fraud early in these conflicts. This bill will allow additional time for investigators and auditors to thoroughly investigate and review all war contracts and potentially save the U.S. taxpayers untold millions of dollars. If the current law is left unchanged, each passing day of the conflicts in Iraq and Afghanistan would result in a grant of immunity for fraudulent conduct by war contractors that has gone undiscovered or unprosecuted during the conflicts.

II. History of the Bill and Committee Consideration

A. INTRODUCTION OF THE BILL

Chairman Patrick Leahy introduced the bill, S. 2892, on April 18, 2008, with Senator Grassley.

B. COMMITTEE CONSIDERATION

The Committee voted at a June 26, 2008 executive business meeting to report S. 2892 favorably to the Senate without amendment by voice vote.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Short title

This section provides that the legislation may be cited as the "Wartime Enforcement of Fraud Act of 2008."

Section 2. Suspends the statute of limitations when Congress has authorized the use of military force

This provision amends Section 3287 of title 18, which suspends the statute of limitations "when the United States is at war," to include circumstances where Congress has authorized the use of military force consistent with the War Powers Resolution. Technically, Section 3287 only applies to declared wars, not circumstances where Congress has authorized the use of military force, as in the recent wars in Iraq and Afghanistan. The amendment to Section 3287 specifically tracks the text of the Congressional authorizations for the use of the Armed Forces in Iraq and Afghanistan and refers only to those authorizations described in the War Powers Resolution (50 U.S.C. 1544(b)). As a result, only significant military actions requiring Congressional action would trigger this suspension of the statute of limitations. This amendment is not intended to apply to peacekeeping missions under the auspices of the United Nations or military actions not specifically authorized by Congress pursuant to the War Powers resolution. This language is intended to apply the suspension of statute of limitations to the wars in Iraq and Afghanistan.

The bill extends the statute of limitations for five years from the termination of hostilities, as opposed

to the three years under current law. When the original Wartime Suspension of Limitations Act was passed in 1942, the criminal statute of limitations was only three years, and today it is five years. This change is consistent with the standard statute of limitations for all criminal fraud provisions and is necessary to update the law for modern times. See 18 U.S.C. 3282(a).

The bill also makes clear that the act that ends the tolling of the statute of limitations period must be an official act of the President with notice to Congress, or a concurrent resolution of Congress. This change is necessary so that the date ending the authorization of military force is clear, so courts, prosecutors, and litigants can be sure when the statute of limitations starts to run. This change will avoid any confusion or unnecessary litigation in enforcing fraud cases in the future.

Lastly, the bill clarifies that for purposes of applying the definitions in Section 103 of Title 41 in Section 3287 of Title 18, the term "war" shall include Congressional authorizations for the use of military force pursuant to the War Powers resolution. This is just a conforming amendment so the definitions in the law can properly be applied.

IV. Congressional Budget Office Cost Estimate

The cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available for inclusion in this report. The estimate will be printed in either a supplemental report or the Congressional Record when it is available.

V REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2892.

VI. CONCLUSION

The Wartime Enforcement of Fraud Act, S. 2892, would close a loophole in current law and give the government new power to prosecute contracting fraud in Iraq and Afghanistan. If passed, the government could recover taxpayers' money lost in no-bid and cost-plus contracts awarded to companies that have delivered defective products, overbilled the government, or committed criminal fraud. The legislation would update a law first passed by the Congress during World War II that suspends the statute of limitations for contracting fraud offenses during times of war. It will allow the government to punish war profiteers and potentially save the U.S. taxpayers untold millions.

VII. ADDITIONAL VIEWS

ADDITIONAL VIEWS OF SENATORS SESSIONS AND COBURN ON S. 2892, "THE WARTIME ENFORCEMENT OF FRAUD ACT OF 2008"

The Wartime Enforcement of Fraud Act amends the Wartime Suspension of Limitations Act, which currently extends the statute of limitations for contracting fraud offenses committed during a time of war. The bill would add any "Congressional enactment of a specific authorization for the use of the Armed Forces" as a trigger for suspension of the statute of limitations for contracting fraud offenses. Addi-

tionally, the bill provides that the statute of limitations is suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation with notice to Congress.

Individuals who commit fraud against the government during hostilities should be vigorously prosecuted. We have a history of supporting legislation, such as the Military Extraterritorial Jurisdiction Act, that ensures crimes and frauds perpetrated in Iraq or other places overseas are rightly brought to justice here in the United States. We support efforts to provide the Department of Justice all the tools they need to prosecute contractors who commit fraud against the United States. However, we fear this approach would have the unintended consequence of creating a potentially unlimited statute of limitations period for defense contractors. This goes against the great traditions of our American legal system where statutes of limitation typically begin to run as soon as a crime has been committed and are usually limited to a specific number of years. In fact, prosecution for most federal crimes must begin within five years of the commission of an offense. Limited exceptions include murder and other offenses punishable by death, and some federal terrorism and sex offenses.

By including a Congressional authorization for the use of Armed Forces as an event that triggers suspension of the Statute of Limitations, the bill will directly impact conflicts that fall short of declared war. The Wartime Suspension of Limitations Act was enacted after World War II and we can only assume that the language is intentionally limited to declared wars. A declared war is of a different nature than an undeclared military conflict which can be a much

smaller affair that does not similarly affect the government's ability to build and prosecute war fraud cases. If, as is potentially the case in the current conflicts with Iraq and Afghanistan, a President is hesitant to officially announce the end of hostilities, the statute of limitations will never start running. This means contractors could remain subject to potential liability for criminal offenses (or investigations) for years, possibly a lifetime. Even if an official act declaring an end to hostilities is made, it may not happen for a very long time. The Supreme Court recently said in Boumediene v. Bush, "the duration of hostilities may last a generation or more."[1]

Furthermore, providing a very long—potentially indefinite—statute of limitations for a criminal offense violates longstanding principles often articulated by the Supreme Court. In *Toussie v. United States*, the Court held:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also

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[1] 128 S. Ct. 2229, at 2270 (2008) (the Court was expressing concern for detainees, saying that the possibility of persons wrongfully detained for such a long conflict "is a risk too significant to ignore").

> have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[2]

The Court has also held:

> Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case. Such a [statute of] limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[3]

We believe this bill creates two disturbing disincentives at a time where contractors are vital to national security and American efforts during armed conflicts: (1) it could make it more difficult to recruit contractors needed during conflict, and (2) it could make it more difficult for the government to prove these cases if too much time goes by. We believe the

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[2] Toussie v. United States, 397 U.S. 112 (1970).

[3] U.S. v. Marion, 404 U.S. 307, 321-323 (1971) (emphasis added).

statute of limitations issue should be studied closely and that the Department of Defense should weigh in before the Senate considers the bill.

JEFF SESSIONS.
TOM COBURN.

VIII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2892, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

* * * * * * *

PART II--CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 213—LIMITATIONS

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§ 3287. Wartime suspension of limitations

When the United States is at war or *Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. Sec. 1544(b))*, the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, can-

celation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war *or directly connected with or related to the authorized use of the Armed Forces*, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until [three] *five* years after the termination of hostilities as proclaimed by [the President] *Presidential proclamation, with notice to Congress*, or by a concurrent resolution of Congress.

Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section. *For purposes of applying such definitions in this section, the term 'war' includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. Sec. 1544(b)).*

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES *ex rel.*, CARTER,	)	
Plaintiff,	)	Civil Action No. 11-cv-602-JCC/JFA
v.	)	
HALLIBURTON CO. *et al.*,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Relator Benjamin Carter appeals to the United States Court of Appeals for the Fourth Circuit from the Order entered in this action on the 29th of November, 2011 (Dkt. No. 42), granting with prejudice Defendants' Motion to Dismiss dated October 21, 2011 (Dkt. No. 11) and denying Relator's Motion for Leave to File Sur-Reply dated November 11, 2011 (Dkt. No. 29).

Respectfully submitted,

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December 28, 2011

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES *ex rel.*, BENJAMIN CARTER,	:	
	:	
Plaintiff,		
	:	1:11cv602 (JCC/JFA)
v.	:	
		Sept. 19, 2013
HALLIBURTON CO., *et al.*,	:	
	:	
Defendants.		

MEMORANDUM OPINION

JAMES C. CACHERIS, District Judge.

This matter is before the Court on supplemental briefing for Defendants Halliburton Company ("Halliburton"), KBR, Inc. ("KBR"), Kellogg Brown & Root Services, Inc. ("KBRSI"), and Service Employees International, Inc.'s ("SEII") (collectively, "Defendants") Motion to Dismiss [Dkt. 11], following the Fourth Circuit's decision in *United States ex rel. Carter v.*

Halliburton Co., 710 F.3d 171, 174 (4th Cir.2013) that reversed this Court's November 29, 2011 opinion and remanded the case for consideration of the public disclosure bar.[1] For the following reasons, the Court finds that the public disclosure bar does not prevent Relator Benjamin Carter ("Relator" or "Carter") from bringing this suit and accordingly, this Court will deny Defendants' Motion to Dismiss with regards to the public disclosure bar.

I. Background

A. Factual Background

The subject matter underlying this case has been before this Court multiple times previously and involves the Defendants' alleged fraudulent billing of the United States. As set forth below, this case is identical to two earlier cases dismissed by this Court and related to several other earlier cases filed in other district courts.

1. Carter's Allegations

In his Complaint, Carter brings a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 through 3733 (the "FCA"), alleging that Defendants falsely billed the Government for services provided to United States military forces serving in Iraq.

Specifically, Carter alleges that Defendants "knowingly presented [or caused to be presented] to an officer or employee of the United States Government ... false or fraudulent claims for payment or ap-

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[1] In analyzing the public disclosure bar, the Court considered the parties' arguments on this issue in both their original and supplemental briefing.

proval" in violation of 31 U.S.C. § 3729(a)(1). (Compl. [Dkt. 1] ¶¶ 157–58.[2]) Carter also alleges that "Defendants knowingly made, used, or caused to be made or used, false records or statements to get false or fraudulent claims paid or approved by the Government" in violation of 31 U.S.C. § 3729(a)(2).[3] (Compl. ¶¶ 192–93.)

These allegations stem from Carter's work as a Reverse Osmosis Water Purification Unit ("ROWPU") Operator in Iraq from mid-January 2005 until April 2005. (Compl. ¶¶ 3, 41, 69.) During that period, Carter worked at two camps, Al Asad and Ar Ramadi. (Compl. ¶¶ 41–42.)

Carter alleges that "the Al Asad Defendant ROWPU employees were not engaged in any actual water purification duties on discrete dates in January 2005," but nevertheless, the "Al Asad ROWPU employees' time [was] billed under LOGCAP[4] III" as if they had been purifying water. (Compl. ¶¶ 130–31.) Similarly, while working at Ar Ramadi, Carter was allegedly "required to fill in timecards stating that he worked 12 hour[s] a day, each day, with uniformity, on ROWPU functions," though during this time

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[2] The Complaint has two sets of paragraphs 157 and 158. This citation refers to the second set, on page 32 of the Complaint.

[3] Section 3729(a)(1) has been re-codified at 31 U.S.C. § 3729(a)(1)(A) and section 3729(a)(2) has been re-codified at 31 U.S.C. § 3729(a)(1)(B).

[4] As noted in this Court's May 10, 2010 Memorandum Opinion in 1:08cv1162, LOGCAP III was the Logistics Civil Augmentation Program ("LOGCAP") contract put out by the Department of Defense for civil logistical support for military operations in Iraq, Afghanistan, and other countries.

Carter "actually worked 0 hours per day on ROWPU functions." (Compl. ¶¶ 54–55.) Carter also alleges that all "trade employees" such as he were required to submit time cards totaling "exactly 12 hours per day and 84 hours per week" and that it was their "routine practice" to do so. (Compl. ¶¶ 60–61, 65, 67–68.)

In essence, Carter contends that Defendants had knowledge that at the Ar Ramadi and Al Asad camps in Iraq, ROWPU "personnel were not engaged in any water testing or purification duties in support of the LOGCAP Contract," and that "Defendants were billing the Government for work that was not actually performed." (Compl. ¶¶ 163, 166.)

B. Procedural Background

1. 2008 Carter

Carter filed an earlier case in this Court against Defendants, Civil Action No. 08cv1162 (JCC/JFA) ("2008 Carter"). Relator originally filed 2008 Carter on February 1, 2006 in the United States District Court for the Central District of California, with a first amended complaint filed on February 10, 2006. (1:08cv1162 [Dkt. 5].) 2008 Carter was transferred to this Court on November 3, 2008. (1:08cv1162 [Dkt. 73].) This Court dismissed Carter's first amended complaint in 2008 Carter on January 13, 2009, granting leave to amend. (1:08cv1162 [Dkt. 90].) Carter filed a second amended complaint in 2008 Carter on January 28, 2009. (1:08cv1162 [Dkt. 92].)

In July 23, 2009, this Court dismissed Counts 2 and 3 of Relator's second amended complaint in 2008 Carter in their entirety; dismissed Count 1, alleging

that Defendants knowingly submitted false claims to the United States, except as it related to September 1, 2004 through April 2005 for Ar Ramadi, and during January 2005 for Al Asad, (*See* Memorandum Opinion ("Mem. Op.") at 19, 22, 1:08cv1162 [Dkt. 121] (July 23, 2009)); and dismissed Count 4, alleging that Defendants knowingly made or used false records or statements material to a false claim, except as it related to the time cards of the Ar Ramadi ROWPU employees from September 1, 2004 to April 2005 (*id.* at 34).

Later, in May 2010, this Court dismissed the remainder of 2008 Carter without prejudice for lack of jurisdiction. (1:08cv1162 [Dkt. 307].) The Court held that 2008 Carter was barred by § 3730(b)(5) of the FCA, which bars a relator from "bring[ing] a related action based on the facts underlying [a] pending action," known colloquially as the FCA's "first-to-file bar." 31 U.S.C. § 3730(b)(5).

2. California Action

The first-filed "pending action" barring 2008 Carter was *United States ex rel. Thorpe v. Halliburton Co.*, No. 05cv08924 (C.D.Cal.), filed on December 23, 2005 ("California Action"). (Mem. Op. at 2, 15–19, 1:08cv1162 [Dkt. 306] (May 10, 2010).)

On March 23, 2010, in the week before 2008 Carter was set for trial, the Department of Justice ("DOJ") disclosed to the parties the existence of the California Action. Defendants moved to dismiss 2008 Carter under § 3730(b)(5)'s first-to-file bar, and this Court dismissed 2008 Carter without prejudice on May 10, 2010. (1:08cv1162 [Dkt. 307].)

After this Court dismissed 2008 Carter, the California Action was dismissed on July 30, 2010. (Mem. [Dkt. 16] at 4.)

3. 2008 Carter Appeal

Relator filed a notice of appeal to the Fourth Circuit on July 13, 2010. (1:08cv1162 [Dkt. 325].) Carter moved to dismiss the appeal on December 14, 2010. (Mem. at 4.) The Fourth Circuit dismissed the 2008 Carter appeal on February 14, 2011. (1:08cv1162 [Dkt. 331, 332].)

4. 2010 Carter

Carter filed a second case in this Court on August 4, 2010, Civil Action No. 10cv864 (JCC/TCB) ("2010 Carter"). The Court dismissed 2010 Carter in May 2011, again holding that the case was barred by the FCA's first-to-file bar. (Mem. Op. at 10–11, 1:10cv864 [Dkt. 46] (May 24, 2011).) Specifically, the Court noted that 2010 Carter was filed while the appeal in 2008 Carter—and, thus, 2008 Carter itself—was still pending. (*Id.* at 10.) Because the two cases were indisputably related, the Court dismissed 2010 Carter without prejudice. (*Id.* at 10–11, 13.)

5. The Instant Action

Carter filed this case on June 2, 2011. [Dkt. 1.] The United States declined to intervene on August 23, 2011. [Dkt. 3.] This Court unsealed the Complaint on August 24, 2011. [Dkt. 4.] Carter's complaint in this case is identical to the complaint filed in 2010 Carter and the second amended complaint filed in 2008 Carter, except for its title, case number, and signature block.

On October 21, 2011, Defendants filed a Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("Motion to Dismiss"). [Dkt. 11.] In that motion, Defendants argued that (1) the Court lacked jurisdiction under the FCA's "first-to-file" bar, 31 U.S.C. § 3730(b)(5), (Mem. at 5–13), based on the California Action and two other related actions which at the time were pending (*United States ex rel. Purcella, et al. v. Halliburton*, Inc., et al., No. 2:04cv205 (E.D.Tex.) (under seal) ("Texas Action") and *United States ex rel. Duprey v. Halliburton, Inc., et al.*, No. 8:07cv1487 (D.Md.) ("Maryland Action")); (2) the Court lacked jurisdiction under the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A); and (3) even if neither jurisdictional bar applied, virtually the entire case must be dismissed due to the FCA's six-year statute of limitations.

Following a hearing on November 18, 2011, this Court granted Defendants' Motion to Dismiss with prejudice on November 29, 2011, holding that the Court lacked jurisdiction under the "first-to-file" bar based on the Maryland Action and also that all of Relator's claims were time-barred except one minor claim under the FCA. [Dkts. 41–42.] In its opinion, the Court did not address the public disclosure bar argument because the Court concluded that it need not reach that issue to dispose of Defendants' Motion to Dismiss.

Relator filed a notice of appeal on December 28, 2011. [Dkt. 59.] On March 18, 2013, the Fourth Circuit reversed this Court's decision to dismiss Relator's complaint with prejudice. The Fourth Circuit found that Relator's claims were not time-barred un-

der the FCA due to tolling under the Wartime Suspension of Limitations Act ("WLSA"). *Carter*, 710 F.3d at 174, 181. It also found that Relator's current complaint was barred under the first-to-file bar by the Maryland Action and Texas Action because those actions were pending at the time Relator filed his latest complaint. The Fourth Circuit concluded, however, that the first-to-file bar no longer precluded Relator from filing an action because both related actions currently were no longer pending. This Court, therefore, erred by dismissing the case with prejudice. As this Court had not addressed the parties' arguments regarding the FCA's public disclosure bar, the Fourth Circuit remanded the case for further proceedings on that issue. The Fourth Circuit rejected Relator's petition for rehearing en banc on April 23, 2013.

Following a status hearing held before this Court on May 28, 2013, the Court ordered supplemental briefing on the parties' arguments, in particular the public disclosure bar. On June 24, 2013, Defendants filed their Supplemental Brief in Support of Defendants' Motion to Dismiss Under the Public Disclosure Bar. ("Supp. Mem." [Dkt. 81].) On July 15, 2013, Relator filed his Supplemental Brief in Support of Relator's Opposition to Defendants' Motion to Dismiss Under the Public Disclosure Bar. ("Supp. Opp." [Dkt. 83].) On July 25, 2013, Defendants filed their Supplemental Reply Brief in Support of Defendants' Motion to Dismiss Under the Public Disclosure Bar. ("Supp. Reply" [Dkt. 84].) The Court held a hearing on the supplemental briefing on September 6, 2013.

II. Standard of Review

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). Defendants may attack subject matter jurisdiction in one of two ways. First, defendants may contend that the complaint fails to allege facts upon which subject matter jurisdiction may be based. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982); *King v. Riverside Reg'l Med. Ctr.*, 211 F.Supp.2d 779, 780 (E.D.Va.2002). In such instances, all facts alleged in the complaint are presumed to be true. *Adams*, 697 F.2d at 1219; *Virginia v. United States*, 926 F.Supp. 537, 540 (E.D.Va.1995).

Alternatively, defendants may argue that the jurisdictional facts alleged in the complaint are untrue. *Adams*, 697 F.2d at 1219; *King*, 211 F.Supp.2d at 780. In that situation, "the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.' " *Virginia v. United States*, 926 F.Supp. at 540 (quoting *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir.1993)); *see also Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir.2004) (holding that "the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment") (citations omitted).

In either circumstance, the burden of proving subject matter jurisdiction falls on the plaintiff. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Adams*, 697 F.2d at 1219; *Johnson v. Portfolio Recovery Assocs.*, 682

F.Supp.2d 560, 566 (E.D.Va.2009) (holding that "having filed this suit and thereby seeking to invoke the jurisdiction of the Court, Plaintiff bears the burden of proving that this Court has subject matter jurisdiction").

III. Analysis

Defendants argue that Relator's claims are barred under the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4), which jurisdictionally bars FCA claims that are based on matters that were publicly disclosed unless the relator was the "original source" of the allegations. (Mem. at 16.)

A. Retroactivity of the PPACA

Before reaching the merits of this argument, the Court must first determine the applicability of the Patient Protection and Affordable Care Act ("PPACA") amendments to the FCA, which were signed into law on March 23, 2010, before the filing of this action. *See* Pub. L. No. 111–148, § 10104(j)(2), 124 Stat. 119, 901 (2011). Defendants argue that because the PPACA amendments are not expressly retroactive and they attach a new disability to past conduct, they "cannot be applied to the conduct alleged in this case, all of which occurred before PPACA was enacted." (Mem. [Dkt. 16] at 16 n. 11; see Supp. Mem. [Dkt. 82] at 3.) Carter argues that the PPACA amendments should apply because the instant complaint was filed after the PPACA was passed and made effective and therefore he contends that no retroactivity is required for the PPACA to apply here. (Opp. [Dkt. 21] at 20; Supp. Opp. [Dkt. 83] at 15.)

The Court concludes that the pre-PPACA version of the FCA applies to this case. Certain provisions of the FCA, including the public disclosure bar, were amended by the PPACA in March 2010. The Supreme Court recently recognized that application of these amendments would have retroactive effect because they "eliminate[d] petitioners' claimed defense to a *qui tam* suit" and that the PPACA lacked the necessary clear congressional intent for retroactive application as it "makes no mention of retroactivity." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson* ("Wilson"), 559 U.S. 280, 283 n. 1, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010) (citing *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997)).

In *Hughes Aircraft*, the Supreme Court previously addressed the retroactive application of an FCA amendment to a disclosure jurisdictional bar. Prior to 1986, FCA *qui tam* suits were jurisdictionally barred if the information on which they were based was already in the Government's possession. *Hughes Aircraft*, 520 U.S. at 941, 117 S.Ct. 1871. In *Hughes Aircraft*, the Court addressed whether the 1986 amendment to the FCA partially removing that bar applied retroactively to *qui tam* suits brought *after* the 1986 amendment but alleging false claims submitted *before* the enactment of the 1986 amendment. *Id.* at 941, 943, 117 S.Ct. 1871. A unanimous Court held that the 1986 amendment did not apply retroactively to conduct occurring prior to the 1986 amendment's effective date. *Id.* at 951, 117 S.Ct. 1871. The Court reasoned that "the 1986 amendment eliminates a defense to a *qui tam* suit—prior disclosure to the Government—and therefore changes the substance of the

existing cause of action for *qui tam* defendants by 'attach[ing] a new disability, in respect to transactions or considerations already past.' " *Id.* at 948, 117 S.Ct. 1871 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). Accordingly, application of the amendment to conduct occurring prior to the amendment's effective date would result in a retroactive effect on such conduct. The Court distinguished the 1986 FCA amendment from "[s]tatutes merely addressing which court shall have jurisdiction to entertain a particular cause of action," which "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Id.* at 951, 117 S.Ct. 1871 (emphasis in original); *see also Gordon v. Pete's Auto Service of Denbigh, Inc.*, 637 F.3d 454, 461 (4th Cir.2011) (stating that "the [FCA,] at issue in *Hughes Aircraft* ... had retroactive effect because it '[did] not merely allocate jurisdiction among forums' but instead 'create[d] jurisdiction where none previously existed"). The Court concluded that "[g]iven the absence of a clear statutory expression of congressional intent to apply the 1986 amendment to conduct completed before its enactment, we apply our presumption against retroactivity" and applied the pre-amendment FCA in construing the government disclosure jurisdictional bar. *Hughes Aircraft*, 520 U.S. at 951, 117 S.Ct. 1871.

The Supreme Court's reasoning in *Hughes Aircraft* controls the issue because here, like in that case, an FCA amendment modifies a prior jurisdictional bar based on disclosure of the facts underlying the suit and the amendment is silent as to its retroactivity. Similar to the facts in that case, Carter brought this suit after the enactment of the PPACA,

alleging violations by Defendants committed in 2005 before the enactment of the PPACA. In addition, as recognized in *Graham*, the amendment creates jurisdiction where none previously existed, meaning application of the PPACA amendments would have retroactive effect. Finally, the presumption against retroactivity applies here because, as recognized in *Wilson* and *U.S. ex rel. Black v. Health & Hosp. Corp. of Marion Cnty.*, 494 Fed.Appx. 285, 291 n. 9 (4th Cir.2012), the PPACA amendments lack the clear congressional intent necessary for retroactive application. Accordingly, the PPACA amendments to the public disclosure bar do not apply retroactively, and the Court will apply the public disclosure bar using the pre-PPACA statute.

Carter argues that because he brought this suit after the PPACA amended the FCA, the amended statute should apply. (Opp. at 20.) The Supreme Court addressed that argument in *Hughes Aircraft* and dismissed it. *See Hughes Aircraft*, 520 U.S. at 946, 117 S.Ct. 1871 ("Because the 1986 amendment became effective before this suit was commenced, respondent contends that it, rather than the 1982 *qui tam* provision, controls. We disagree.") Accordingly, the fact that the PPACA became effective before this suit was commenced will not alter this Court's application of the pre-PPACA FCA.

B. The Public Disclosure Bar

Section 3730(e)(4)[5], referred to as the "public disclosure bar," provides as follows:

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[5] Given the Court's holding that the pre-PPACA version of the FCA applies here, all references to the statute are to that version unless otherwise noted.

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A, B) (1986–2010). "The purpose of the public disclosure bar is 'to prevent 'parasitic' *qui tam* actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of government fraud.' " *United States ex rel. Davis v. Prince*, 753 F.Supp.2d 569, 578 (E.D.Va.2011) (citations omitted).

In order to determine whether the public disclosure bar eliminates federal court jurisdiction, a district court first must identify the claims in the relator's complaint. *Id.* Here, the relevant claims concern the submission by Defendants of fraudulent timesheets for ROWPU services from September 1, 2004 through April 2005 for Ar Ramadi and for January 2005 for Al Asad.

Second, a district court then must analyze each claim under the Fourth Circuit's standard for the public disclosure bar. *Id.* The Fourth Circuit follows a three-step approach. *See United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 299 (4th Cir.2008), *overruled on other grounds by Wilson*, 559 U.S. at 301, 130 S.Ct. 1396. As recently summarized by this Court:

> First, a district court must determine whether there is a "public disclosure" within the meaning of the FCA that covers the claim in question. If not, the claim is not subject to the public disclosure bar. If there is a public disclosure that covers the claim, the district court must then determine whether the relator's claim is "based upon" the public disclosure. If not, the claim is not barred. But if the claim is "based upon" the public disclosure, the district court must determine whether the relator is an "original source" of the information on which his claim is based. The relator has the burden of proving each jurisdictional fact by a preponderance of the evidence.

Prince, 753 F.Supp.2d at 578 (internal quotations and citations omitted). "Unless 'the jurisdictional facts are intertwined with the facts central to the merits of the dispute,' the district court may then go beyond the allegations of the complaint and resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits." *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir.2009).

1. Is There a Qualifying Public Disclosure?

"To determine whether there is a qualifying 'public disclosure' relating to a claim, a district court must address three issues." *Prince*, 753 F.Supp.2d at 579. The first issue is whether the disclosure occurred in one of the sources enumerated in the statute. *Id.* Section 3730(e)(4)(A) enumerates "three sources: (1) in a 'criminal, civil, or administrative hearing'; (2) in a 'congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation'; or (3) in the 'news media.' " *Id.* (quoting 31 U.S.C. § 3730(e)(4)(A)).

The second issue is "whether the disclosure was made 'public' prior to the filing of the complaint." *Id.* at 580. "Although the Fourth Circuit has not construed the term 'public' as used in § 3730(e)(4)(A), other circuits have done so, reaching essentially similar results" of "generally available to the public" or "in the public domain." *Id.*

The third issue is "whether the public disclosure reveals 'allegations or transactions,' and not merely information." *Id.* (citation omitted). "[T]o qualify as a 'public disclosure,' a disclosure must reveal an allegation of fraud, or a false and true state of facts from which fraud may be inferred."[6] *Id.*

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[6] In *Prince*, the Court noted that "[a]lthough the Fourth Circuit has not specifically construed the phrase 'allegations or transactions' within the meaning of § 3730(e)(4)(A), many circuit courts have done so, adopting the D.C. Circuit's interpretation of the phrase." 753 F.Supp.2d at 580. This Court agrees with *Prince* and, thus, applies it here.

Here, Defendants identify four disclosures that they argue bar the instant case: (1) Carter's colleague Kenneth May's January 23, 2006 testimony before the Senate Democratic Policy Committee,[7] (2) the complaints in 2008 Carter and 2010 Carter, (3) the complaint in the California Action,[8] the Maryland Action, and the Texas Action, and (4) this Court's May 10, 2010 Memorandum Opinion in 2008 Carter.[9] (Mem. at 16–17 & n. 12; Supp. Mem. at 4–5.)

First, all these disclosures are qualifying public disclosures except for the Texas Action, which was and remains sealed. The January 2006 Senate Hearing clearly qualifies under 31 U.S.C. § 3730(e)(4), *Prince*, 753 F.Supp.2d at 579, and "civil complaints are regarded as 'public disclosures' in a 'civil hearing,' " *id.* at 596. Judicial opinions may be considered public disclosures as well. *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir.1994) (noting that "any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes of section 3730(e)(4)(A)"); *see also McElmurray v. Consolidated*

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[7] *See An Oversight Hearing on Whether Halliburton Has Failed to Provide Clean Water to United States Troops in Iraq, Before the Senate Democratic Policy Comm.*, 109th Cong. 3 (Jan. 23, 2006) (statement of Ken May), *available* at http://dpc.senate.gov/dpchearing.cfm?h=hearing27. Carter offers this testimony as Exhibit 6 to his original Opposition.

[8] The complaint in the California Action was unsealed in April 2010. *See* ORDER Unsealing Complaint, *United States ex rel. Thorpe v. Halliburton Co.*, No. 05cv08924 (C.D.Cal.) [Dkt. 34] (filed Apr. 27, 2010, entered Apr. 29, 2010).

[9] Defendants do not discuss this last category of disclosures in their supplemental brief.

Gov't of Augusta–Richmond Cnty., 501 F.3d 1244, 1253 (11th Cir.2007). Second, the hearing, the California Action, Maryland Action, and 2008 Carter and 2010 Carter were all "public," as they were in the public domain prior to the filing of the instant complaint. *Prince*, 753 F.Supp.2d at 569. And third, each of these reveals "an allegation of fraud." *Id.* The California Action, Maryland Action, 2008 Carter, and 2010 Carter plainly allege fraud, and May's Senate Hearing testimony does as well. (Opp. Ex. 6 (noting "time card fraud" and "fraudulent documentations and overbilling".) Moreover, "[t]o constitute a 'public disclosure' sufficient to negate FCA jurisdiction, a disclosure need not specifically show fraud, but must merely be sufficient to put the government on notice of the likelihood of related fraudulent activity." *Lopez v. Strayer Educ., Inc.*, 698 F.Supp.2d 633, 641 (E.D.Va.2010) (internal quotation marks and citations omitted). Thus, there were public disclosures of the fraud allegations alleged in the instant complaint before it was filed on June 2, 2011.

2. Are Carter's Instant Allegations "Based Upon" the Public Disclosures?

Having found qualifying public disclosures, the Court next turns to whether Carter's allegations are "based upon" any of these disclosures. "A public disclosure, by itself, does not trigger the public disclosure bar under the pre–2010 FCA; rather, the relator's allegations must also be 'based upon' the public disclosure." *Prince*, 753 F.Supp.2d at 582 (citing 31 U.S.C. § 3730(e)(4)(A)). In the Fourth Circuit, "a *qui tam* action is barred only if the relator's allegations are actually derived from public disclosures:

> [A] relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based. Such an understanding of the term 'based upon,' apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s undisputed objective of preventing 'parasitic' actions, ... for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

Id. (quoting *Siller*, 21 F.3d at 1348).[10] "Thus, a *qui tam* action will not be barred if the plaintiff's claims are similar or even identical to the publicly disclosed allegations, so long as the plaintiff had independent knowledge of the facts and did not derive his allegations from the public disclosure itself." *Id.* (internal quotation marks and citations omitted). Although a relator's claim must be "actually derived" from the publicly disclosed allegations, "it is important to note that § 3730(e)(4) bars jurisdiction over a relator's claim if the claim is even partly derived from a public

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[10] The amended § 3730(e)(4)(A) no longer uses the phrase "based upon" and now bars claims "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 U.S.C. § 3730(e)(4)(A) (2010). In *Prince*, this Court noted that "*Siller's* interpretation of 'based upon' has been criticized by many circuits.... Notwithstanding this criticism, *Siller* remains the law in the Fourth Circuit for cases prior to the FCA's 2010 amendment." *Prince*, 753 F.Supp.2d at 582–83.

disclosure." *Id.* "The relators have the burden of proving that their claim was not derived from the [public disclosure]." *Id.* at 589 (citing *Vuyyuru*, 555 F.3d at 348).

Carter's allegations are not "based upon" the qualifying public disclosures because the Court finds that Carter has shown that he had independent knowledge of the facts underlying his claim and that he derived his allegations from his own independent knowledge. *Id.* Defendants first argue that Carter actually derived his allegations from Kenneth May's Senate testimony. (Mem. at 19–21; Supp. Mem. at 8–9.) The entirety of May's testimony addressing time card fraud is: "The disregard for essential health, safety and security measures, *time card fraud, fraudulent documentations and overbilling* ... made life at Ar Ramadi nearly unbearable." (Opp. Ex. 6 (emphasis added).) Defendants argue that Carter borrowed from May's allegations, especially the assertion that it was routine practice for KBR employees to record on their timecards hours they did not work. (Mem. at 20–21.) Defendants' evidence that Carter borrowed from May is November 2005 e-mails between the two. (*Id.* Ex. 8.) These e-mails, however, are not by themselves public disclosures.

The Court finds that the record establishes that it is more likely than not that Carter derived his allegations from his own personal knowledge and not from May's Senate testimony or, for that matter, from May's e-mails. *Prince*, 753 F.Supp.2d at 589. Carter testified that he first was instructed to record 12 hours on his time card when he arrived at Al Asad, his first location in Iraq. (Carter Dep. Tr. 25:17–26:3 (Opp. Ex. 9).) According to Carter, he was told to go to

the ROWPU foreman at Al Asad and ask if there was work to be done while Carter was waiting, and the foreman would "sign off on [Carter's] 12 hours for the days that [Carter] was at Al Asad." (Carter Dep. Tr. 26:14–19.) Carter also testified that "the first day or the second day" he was in Ar Ramadi, Walter Meyers, who was the ROWPU foreman at Ar Ramadi, (Compl. ¶ 59), told Carter that even though there was no operating ROWPU with which to work, Carter could still report that he had worked 12 hours. (Carter Dep. Tr. 30:9–22.) Carter also testified that a representative of Defendants told him "on either the first Sunday or the second Sunday" that he was at Ar Ramadi that "on Sundays we would get our 12 hours but we were to either be playing softball or watching softball or washing our vehicles or cleaning our hooch." (Carter Dep. Tr. 29:1–8.) Carter essentially testified that his knowledge of time card fraud at Al Asad and Al Ramadi came from his own experiences there. Thus, "on this record, it seems more likely that [Carter] derived [his] allegations ... from the facts learned by [Carter] during [his] employment" with Defendants "than from a single [statement]" in May's Senate testimony that "does not provide any details about fraudulent payments" by Defendants. *Prince*, 753 F.Supp.2d at 590.

Defendants make much of the November 2005 e-mail exchanges between Carter and May. (Mem. at 23–25; Supp. Mem. at 8–9.) Defendants appear to try and bring May's statements in these e-mails into his Senate testimony. (Mem. at 19–20.) May, however, did not testify to any of the facts within the e-mails. Although they are not qualifying public disclosures, Defendants appear to use these e-mails to negate Carter's independent knowledge. Defendants argue

that throughout the discussions embodied in these e-mails, Carter and May's correspondence makes it clear that May was the one with firsthand information underlying the timekeeping allegations. (*Id.*)

Carter and May's deposition testimony, however, undermine any contrary inferences raised by these email discussions. As set forth above, Carter testified that his first knowledge of billing for time not worked came when he first arrived at Al Asad and on his first or second day at Al Ramadi. May, in contrast, testified that he "can only speak for what [he] did on [his] time cards," that he never heard instructions from a supervisor to an employee to bill twelve hours per day, and that he only could infer that that direction was given based on the widespread practice of employees billing twelve hours per day ever day. (May Dep. Tr. 78:5–19 (Opp. Ex. 7).) Also as set forth above, Carter learned about the Sunday practices of billing for playing softball or doing nothing on his first or second Sunday at Al Ramadi.

Carter additionally testified to his own experience with the mechanics of submitting time cards and supervisors' participation in filling them out. Carter stated that the time card recording procedure changed "sometime in February" of 2005, when Walter Meyers and Tom Smith "required that we leave our time sheets in ... Walter's office, and we would then fill them out at 7:00 p.m. in front of Walter and Warren Smith." (Carter Dep. Tr. 36:2–6.) Carter then testified that "Walter required [Carter to] be responsible for Dale Lehew, the ROWPU operator underneath [Carter at Ar Ramadi, (Compl. ¶ 59)], so [Lehew's] hours matched [Carter's] hours ... [s]o Walter instructed [Carter] to take care of Dale Lehew's time

sheet." (Carter Dep. Tr. 36:7–16.) In contrast, May's deposition testimony indicates that May lacked direct knowledge of many of these allegations. He testified that at a certain point in time, which he could not recall, that "all of a sudden the supervisors were bringing in all the time sheets that were already signed. And then I would assume that there were completed by the employee. But according to Ben [Carter], they were written down by the supervisors, the hours worked." (May Dep. Tr. 86:12–19.) May testified that "[he] can't say whether it happened or not because [he] didn't see it. So it makes sense what [Carter] says." (May Dep. Tr. 86:20–22.) This testimony, given its detail, establishes that it is more likely than not that Carter had independent knowledge of the facts underlying his claim and that he derived his allegations from his own independent knowledge. *Prince*, 753 F.Supp.2d at 589.

Next, Defendants argue that the California Action and Maryland Action are public disclosures barring jurisdiction in this case, but spend little to no time specifically arguing how Carter supposedly derived his allegations from these actions. (Mem. at 17 n. 12; Supp. Mem. at 4–5, 7–9.) They point only to the fact that at the time of Carter's original complaint, his then-lawyer already had filed the California Action, raising the inference that Carter's claims were derived from that public disclosure. (Supp. Mem. at 9 n. 10 (citing *Prince*, 753 F.Supp.2d at 595 (noting that the inference that a relator's claims are derived, at least in part, from public disclosures is stronger where "relators' counsel has filed complaints with similar allegations in other suits").) Critically in *Prince*, however, the relators' counsel also had "admitted to deriving some of the information underlying

the [relators' claim] from the public domain." 753 F.Supp.2d at 595 & n. 52.

Despite the weak inference raised by the fact that Carter's then-lawyer also had filed the California Action, the Court finds that Carter has met his burden of proof that he did not base his allegations on the public disclosures of the California Action and Maryland Action and that he had knowledge independent of those public disclosures. Although the Fourth Circuit affirmed that the general similarities between the allegations underlying the Carter litigation and those other cases are sufficient to make them "related actions" for purposes of the *first-to-file* bar, Carter has shown that he has knowledge independent of those public disclosures. Carter testified that he had independent knowledge of his allegations, as set forth above, with details regarding the time and place of where and when he gained his knowledge. Based on that record, the Court finds that he has proven by a preponderance of the evidence that he did not derive his claims from the public disclosures of the California Action and Maryland Action. In addition, the allegations in the California Action, as this Court noted in its May 10, 2010 Memorandum Opinion addressing the first-to-file bar in 2008 Carter, encompassed activity from December 2001 on, across all of the countries covered by the LOGCAP III contract, thus including, but not specifically naming, the Al Asad and Ar Ramadi bases. (Mem. Op. at 12, 1:08cv1162 [Dkt. 306] (May 10, 2010).) This Court found that at no time were the California relators stationed with Carter or at Al Asad and Al Ramadi. *Id.* at 12–13. The absence of these specific allegations in the California Action strengthens the inference that Carter

learned the details of his allegations based on his own personal knowledge.

Finally, for similar reasons, the Court rejects Defendants' argument that Carter's Action is barred by 2008 Carter, 2010 Carter, and this Court's May 10, 2010 Memorandum Opinion. Defendants do not explain how Carter "derived" the instant complaint from any of these sources for purposes of the public disclosure bar. Their argument as to Carter's own prior complaints is particularly untenable. The public disclosure bar is designed to eliminate parasitic lawsuits. *See Graham Cnty.*, 559 U.S. at 294–95, 130 S.Ct. 1396. In contending that the instant suit is barred by 2008 Carter and 2010 Carter, Defendants in essence argue that Carter should be treated as a parasite of himself. This is illogical.

Accordingly, as the Court concludes that it is more likely than not that Carter did not base the instant action on previous public disclosures but rather derived his allegations from his own independent knowledge, the public disclosure bar does not apply here.

3. Is Carter an "Original Source"?

Even assuming Carte's allegations were based upon public disclosures in part, the Court finds Carter has shown by a preponderance of the evidence that he was an original source. The pre–2010 "[s]ection 3730(e)(4)(B) defines 'original source' as an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action.' " *Prince*, 753 F.Supp.2d at 583 (quoting 31 U.S.C. § 3730(e)(4)(B)). A relator's

knowledge "is 'direct' if he acquired it through his own efforts, without an intervening agency, and it is 'independent' if the knowledge is not dependent on public disclosure." *Id.* (internal quotations marks and citations omitted). "Further, while a relator does not need to have direct and independent knowledge of all the information on which a *qui tam* action is based, the relator must have direct and independent knowledge of the facts necessary to plead a plausible fraud claim." *Id.*

For the reasons set forth above, Carter has shown direct and independent knowledge of the facts necessary to plead a plausible fraud claim. *Id.* It is direct because Carter acquired it through his own efforts and without intervening agency, and it is independent because it is not dependent on public disclosure. *Id.* Moreover, the original source requirements are intended to "adequately identify legitimate *qui tam* actions and weed out parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research." *United States ex rel. Jones v. Collegiate Funding Servs., Inc.*, No. 3:07CV290, 2011 WL 129842, at *11 (E.D.Va. Jan. 12, 2011). Carter testified that he directly and independently learned of the time card fraud from his own employment at Al Asad and Al Ramadi. Contrary to Defendants' assertions and the facts in Black, Carter did have access to the relevant "books and records of Defendants" and the "specific documents used to make the false or fraudulent claims": he personally witnessed and was made to participate in the falsification of timecards, the specific document upon which the false and fraudulent claims by Defendants to the government were based. 494 Fed.Appx. at 296. For the reasons more thoroughly set forth above in

the previous step of analysis, the Court finds that Carter has shown by a preponderance of the evidence that he is not a "plaintiff[ ] who offer[s] only secondhand information, speculation, background information or collateral research." *Collegiate Funding Servs.*, 2011 WL 129842, at *11. Thus, even assuming Carter's allegations partially were based on public disclosures, he has shown that it is more likely than not that he was the original source of his allegations.

IV. Conclusion

For the foregoing reasons, the Court will deny Defendants' Motion to Dismiss based on the FCA's public disclosure bar. In accordance with the affirmed dismissal on the grounds of the FCA's first-to-file bar, however, the Court will dismiss Relator's Complaint without prejudice.

An appropriate Order will issue.

/s/
James C. Cacheris
UNITED STATES DISTRICT
COURT JUDGE

September 19, 2013
Alexandria, Virginia

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES *ex rel.* BENJAMIN CARTER,	)	
Plaintiff,	)	
v.	)	1:11cv602 (JCC/JFA)
HALLIBURTON CO., *et al.*	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendant Halliburton Co.'s ("Defendant") Motion to Dismiss [Dkt. 11] is DENIED;

(2) in accordance with the Court's affirmed dismissal on the grounds of the FCA's first-to-file bar [Dkts. 65-66], Relator's Complaint [Dkt. 1] is DISMISSED WITHOUT PREJUDICE;

(3) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum

Opinion to all counsel of record.

/s/
James C. Cacheris
UNITED STATES DISTRICT
COURT JUDGE

September 19, 2013
Alexandria, Virginia

APPENDIX O

(Order List: 573 U.S.)

Tuesday, July 1, 2014

* * *

CERTIORARI GRANTED

* * *

12-1497 KELLOGG BROWN & ROOT, ET AL. v. UNITED STATES, EX REL. CARTER

The motion of Chamber of Commerce of the United States of America, et al. for leave to file a brief as *amici curiae* is granted. The motion of National Defense Industrial Association for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted.

* * *

APPENDIX P

[Benjamin C. Carter – THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION – February 17, 2010

United States of America Ex Rel Benjamin Carter v. Halliburton Co., et al.]

[Confidential Video Deposition Transcript – February 17, 2010]

[4] **BENJAMIN CARTER**

* * *

VIDEO OPERATOR: *** This is the deposition of Benjamin Carter taken on behalf of the Defense in the matter of Benjamin Carter versus Halliburton Company, Case Number 1:08-cv-1162 in the U.S. District Court for the Eastern District of Virginia.

This deposition is being taken at 8605 Westwood Center Drive, Vienna, Virginia 22182. The time is approximately 9:36 a.m. The date is February 17, 2010.

The court reporter is Julie Baker with the firm of Ace-Federal Reporters. I am the video operator Nancy Evans representing Ace-Federal Reporters.

Will counsel identify themselves and who they represent and will the court reporter please swear in the witness.

MR. MAGNANINI: I guess we'll go first. Bob Magnanini for the Plaintiff, Benjamin Carter, Ex Rel. United States.

MR. HOLMES: Cliff Holmes on behalf of Benja-

min Carter.

MR. MARGOLIS: Craig Margolis and Tirzah Lollar from Vinson & Elkins on behalf of the Defendants, and Sharon Stagg is also present on behalf of the Defendants.

Whereupon,

BENJAMIN C. CARTER was called as a witness and, having first been duly sworn, was examined and testified as follows:

* * *

[5] **DIRECT EXAMINATION**

BY MR. MARGOLIS:

* * *

Q. Good morning, Mr. Carter.

A. Good morning.

Q. We've just been introduced. My name is Craig Margolis. I'm a lawyer for the Defendants. I'm going to collectively refer to during the course of the deposition as the Defendants or as KBR.

You've had your deposition taken before; is that correct?

A. Correct.

Q. You're familiar with the basic rules for a deposition?

A. I believe so.

[6] Q. When I ask you a question, if you don't understand it, I'm going to ask you, please, to let me know that and if I can, I will try to rephrase it for you. Okay?

A. Okay.

Q. If you answer a question without asking me to rephrase it, then we're going to assume that you've understood the question and answered it.

A. Understood.

Q. It's important for us to not speak over each other so that the court reporter can get down all of your testimony accurately. I'll do my best to make sure that I don't ask you another question until you finished answering my question and I'd ask you to do the same, that you not answer a question until I finished phrasing it.

A. Right.

Q. You understand, sir, that you are under oath today, and that's the same oath that you'd be subject to in a courtroom before a judge and jury. Do you understand that?

A. I do.

[7] Q. You have the same obligation to be truthful in your testimony today as you would if you were appearing before a judge and a jury?

A. I understand.

Q. Sir, are you taking currently any prescription medications?

A. I am.

Q. Can you please tell me what those are?

A. I take Zoloft and a medication, I think it's called Tenex. It helps eliminate nightmares.

Q. Are you taking both of those currently?

A. Yes.

Q. When was the last time you've taken those medications?

A. This morning. I took the Zoloft this morning. The Tenex I take at night.

Q. Is there anything about the medication that you're taking that you believe would prevent you from understanding my questions?

A. No.

Q. Anything about the medication that you're taking that you believe would prevent you from being [8] able to truthfully and completely answer the questions that are being posed to you during the deposition?

A. No.

Q. Mr. Carter, we'll spend some time in a bit talking about your background, but I want to start the deposition essentially by giving you the opportunity to explain to us in your own words how it is that you believe the Defendants defrauded the United States.

MR. MAGNANINI: Objection to form, but you can answer.

THE WITNESS: Well, I believe that I was hired to be a ROWPU operator in Iraq essentially as a subcontractor for the United States government. I didn't do any ROWPU work -- well, let me back it up.

I did very little ROWPU work the entire time I was in Iraq, so it's my understanding that we were getting paid to do a job with U.S. tax dollars that we didn't do.

BY MR. MARGOLIS:

Q. What do you mean by ROWPU work?

[9] A. Water purification and water analysis, the operating of a reverse osmosis water purification system.

Q. I'm going to use the acronym ROWPU through your deposition today. Do you understand what a ROWPU is?

A. Yes.

Q. And that stands for reverse osmosis water purification unit; is that correct?

A. Correct.

Q. Is that the water purification system that you just referred to in answering the question?

A. It is.

Q. You just testified that it's your understanding that KBR was paid to do a job with U.S. tax dollars that wasn't done. What's that understanding based on?

A. It was based on the training that I received in Houston before I deployed to Iraq where I was told we were working for the United States government to perform a service for the U.S. soldiers in Iraq.

[10] Q. What's the service that you were told that you were going to perform?

A. Water purification.

Q. Who told you that?

A. Beth Laxton from KBR would have been the first person who was, my understanding, a recruiter, an employment recruiter. She is who responded to my application for the job as a ROWPU operator.

Q. Is it your position, sir, that any work that you engaged in that wasn't physically operating a ROWPU was not work that could be properly billed to the United States?

MR. HOLMES: Objection.

MR. MAGNANINI: Objection to form.

THE WITNESS: No. That wasn't my understanding.

BY MR. MARGOLIS:

Q. So you would agree that work that you were performing besides operating a ROWPU would be properly billable to the United States?

MR. HOLMES: Objection; calls for a legal conclusion.

[11] MR. MAGNANINI: You can answer.

THE WITNESS: Can you say that again?

BY MR. MARGOLIS:

Q. A ROWPU is a machine; correct, broadly speaking?

A. Broadly speaking.

Q. That purifies water?

A. Correct.

Q. Is it your position that work you engaged in outside of operating that machine was not properly billable to the United States?

MR. MAGNANINI: Objection to form. You can answer.

WITNESS: That's not my understanding on how you define "work."

BY MR. MARGOLIS:

Q. How do you define "work," Mr. Carter?

A. A task. I didn't consider work sitting in my hooch and playing Nintendo all day as something that could be billable to the government.

Q. That's not what I asked you, Mr. Carter. Work that you performed aside from [12] operating a ROWPU unit, is it your position that that's not billable to the United States?

MR. HOLMES: Objection.

MR. MAGNANINI: Objection to form.

MR. HOLMES: Objection; vague as to "work."

MR. MARGOLIS: I'm going to ask one of the two of you do objections, please.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. So any work outside of physically operating the ROWPU unit that you performed, your understanding it was not properly billable to the United States?

MR. MAGNANINI: Same objection. You can answer.

THE WITNESS: I think I misunderstood. No, I don't believe that any other work wouldn't be billable. I believe that the valid work done besides operating a ROWPU would indeed be billable to the government.

BY MR. MARGOLIS:

[13] Q. What do you mean by "valid work"?

A. For instance, I did a few days of actual work in the carpentry shop for KBR that was helping to build a guard tower that the military had requested. That was actual honest work that we deserved to get paid to do. I did that.

Q. When you say "we" in that pronoun, do you mean that you were entitled to be paid salary for doing that work or do you mean KBR was entitled to be paid by the United States for doing that work?

A. Both.

Q. It's your position, as you defined it, if you and other KBR employees were doing honest work, that is something that you and other KBR employees were entitled to be paid for and then was properly billable to the United States?

MR. MAGNANINI: Objection to the form of the question.

THE WITNESS: You know, I don't know that it was necessarily what I personally considered as work. We were either -- I was either doing work or not doing anything. I don't know that I completely [14] understood your question.

BY MR. MARGOLIS:

Q. When you were doing work then, and we'll discuss that in a little more detail in a minute, that was work that you understood that you should be paid for. Is that fair to say?

A. Correct.

Q. And that's, in turn, work that should be properly billed to the United States?

MR. MAGNANINI: Objection to form.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. And that would include, as you testified, the carpentry work that you did working on the guard towers; correct?

A. Correct.

Q. Would that include other duties or other work tasks that you engaged in while you were in Iraq besides physically operating a ROWPU?

A. Yes, on a few occasions.

Q. What were those few occasions?

A. Let me think. I also spent a day working [15] with the carpenters on building a wall at the old Iraqi military police building. Then there was one occasion where I think I worked, if my memory is correct, a couple of hours helping the electricians one night when the generators were shorting out due to rain.

Q. So work you had performed assisting the electricians, you would understand as honest work for which you were entitled to be paid; is that correct?

MR. MAGNANINI: Objection to form.

THE WITNESS: Absolutely.

BY MR. MARGOLIS:

Q. And would be properly billed to the United States; correct?

MR. MAGNANINI: Same objection.

THE WITNESS: I would assume.

BY MR. MARGOLIS:

Q. Please continue. Aside from the time you spent assisting the electricians with the generators that were shorting out because of rain, what other instances that you can recall you were doing, as you [16] put it, honest work?

A. I recall one time that we were told by Tom Smith, Warren, the chief of services to all go drive around the base at Ramadi and pick up garbage because some government inspector was going to be arriving in a few days, so all of the trades people, the electricians, the plumbers, the ROWPU operators drove around and picked up garbage.

Q. That was work, wasn't it?

A. Yes.

MR. MAGNANINI: Objection to form.

BY MR. MARGOLIS:

Q. There was an objection, but your answer was yes?

A. Yes.

Q. That was work that was properly recorded by you in a time sheet; correct?

MR. MAGNANINI: Objection to the form, but you can answer.

THE WITNESS: I don't believe that's the case.

BY MR. MARGOLIS:

[17] Q. Taking the time sheet out for a moment, that was work for which you should properly have been paid by KBR, is that fair to say?

MR. MAGNANINI: Same objection.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. And therefore, it's properly billed to the government; correct?

MR. MAGNANINI: Same objection.

THE WITNESS: I don't believe so. I wrote 12 hours that day as a ROWPU operator doing ROWPU work. I didn't designate on my time sheet that I spent that day picking up garbage.

BY MR. MARGOLIS:

Q. Is your position, then, that in order to be paid

yourself for the work that you performed, that you would have to annotate the task that you were working on on a time sheet that you submitted?

MR. MAGNANINI: Objection to form.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. So your position is that if you were [18] picking up trash, as you stated on one occasion, you would have had to put on a time sheet "picking up trash" in order to be paid for that work?

A. No, because I knew that I was going to be paid for the 12 hours regardless if I worked or not.

Q. So you're not saying, then, you would have had to put on a time sheet "picking up trash" in order for you to have been paid for that work?

A. Right. I'm not saying that. I'm saying, for instance, on a time sheet there were numerous occasions where I would write -- I was instructed to write an additional half hour of work that was spent due to incoming mortars called bunker time. And so I was told that that needed to be specifically mentioned on the time sheet to recognize that that's what that time was spent doing.

And so there were other times where I would specifically write on my time sheet that I spent an hour additionally to the 12 hours, for instance, doing, a work order or drafting something to be built.

[19] And so I was told that I needed to make a note of that on a time sheet of work in addition to ROWPU work.

Q. With respect to bunker time, are you saying that you would record bunker time on a time sheet as

additional time -- excuse me.

Are you saying you would write down bunker time as additional time spent on a time sheet?

A. Yes.

Q. Is that the case regardless of when you were required to go to a bunker because of an incoming attack?

A. That was my understanding, yes.

Q. Even during your regular work hours, if you were required to go to a bunker because of an attack, you would put down additional time beyond 12 hours as bunker time?

A. The best that I can recall, yes.

And if I can explain, for instance, if we had a mortar attack that occurred at 6:30 p.m. and we were in the bunker, we would write 12-1/2 hours [20] that day, even though the day may have ended at 7:00 p.m., our 12-hour work day.

We would all – all the crafts and trades people would add an additional half hour to our time that day.

Q. How long were you in the bunker?

A. It would vary. It was interesting because by the time we were told to go to the bunker, the mortar attack was already over.

So you go in the bunker just so they could do accountability to make sure everybody is accounted for, and that was the bunker time. It wasn't a duration of time that we were in the bunker to avoid mortars. It was more administrative.

Q. Wouldn't the military give an all clear before

you were supposed to leave the bunker?

MR. MAGNANINI: Objection to form.

THE WITNESS: That would generally happen within a few minutes of arriving at the bunker, yes. There would be an all clear, but we had to get an all clear from KBR's management.

BY MR. MARGOLIS:

[21] Q. What was your understanding of accountability? Was that a count to make sure everybody was accounted for?

A. Yes.

Q. And nobody was injured, for example, by a mortar attack?

A. Exactly.

Q. How long would that typically take?

A. It would vary. One took particularly long because they couldn't locate a KBR employee. He was out driving, so I think he just ducked under his truck, but a half hour, maybe 45 minutes.

Q. Mr. Carter, you've given us an example of a mortar attack that would take place at 6:30 and you record bunker time for that. What if there was a mortar attack that would take place in the middle of your workday, let's say at 1:00 in the afternoon?

Would you record additional bunker time beyond your 12-hour day for that?

A. I don't recall specifically any mortar attacks that occurred in the middle of the day. I'm trying to recall -- I can't recall if there were.

[22] Q. What about attacks that took place in the morning before your workday began? Were there any

mortar attacks that took place at that time?

A. Yes. I remember one specifically that happened about 6:00 a.m. And so we ran to the bunker and waited for accountability and went back to the hooch and showed up at work at 7:00 and continued with the 12-hour day and added a half hour that morning for that attack.

Q. Can you recall any instance where you recorded bunker time for time spent in a bunker outside of your usual 12-hour workday that you would have recorded separately on a time card?

A. I don't know if I exactly understand what you mean by that.

Q. Let me ask a question. When did your workday begin?

A. 7:00 a.m.

Q. When did it end?

A. 7:00 p.m.

Q. That's the 12 hours you've been referring to?

[23] A. Correct.

Q. Can you recall any instance where you would have recorded bunker time separately from the 12-hour day recorded on a time card for time spent in a bunker from the hours of 7:00 a.m. to 7:00 p.m.?

A. Not specifically. That may have happened, but I can't recall sitting here today.

MR. MARGOLIS: Let's go off the record for a moment.

VIDEO OPERATOR: Off the record at 10:00.

(Discussion off the record.)

VIDEO OPERATOR: Back on the record at 14 10:03.

BY MR. MARGOLIS:

Q. Mr. Carter, returning to the trash pickup, is it your understanding that you were properly -- you and the other employees, trades people who were involved in picking up the garbage, were properly paid for that work?

MR. MAGNANINI: Objection; form.

THE WITNESS: It is, yes.

[24] BY MR. MARGOLIS:

Q. It's your position you could be properly paid for that work by KBR, but that KBR should not be billing the government for that work?

A. No. It's not my understanding. I believe that that was proper.

Q. For KBR to bill the government for that work?

A. Yes.

Q. When you signed on to work with KBR, you did so as a ROWPU operator; correct?

A. Yes.

Q. And that came with a certain salary rate attached to it; correct?

A. Yes.

Q. Spelled out in your employment agreement?

A. Yes.

Q. Did you believe when you were engaged in work other than work that you understand would be consistent with the duties of a ROWPU operator, that you should have been paid differently for that work?

A. I never gave it any thought.

[25] Q. For example, if you're picking up trash, do you think you should have been paid less money by KBR because you were picking up trash rather than operating a ROWPU?

A. It never would have entered my mind.

Q. You would have been expected to be paid your usual salary, wouldn't you?

A. Yes -- yeah.

Q. Same for working on constructing guard towers; correct?

A. Correct.

Q. Same for helping the electricians avoid shortouts on generators in a rainstorm; correct?

MR. MAGNANINI: Objection; form.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. Now, on your time cards, I understand your position is that you were instructed to record 12 hours a day on your time cards; is that right?

A. That's correct.

Q. Who instructed you to do that?

A. I believe the first time I was instructed [26] to do that was when I arrived at Al Asad by -- I'm not positive, but I think it was a man named David Stallard, and this was during our Iraq orientation.

Because while I was in Dubai, whoever the KBR person was who was holding those meetings instructed me to write down eight hours for travel time, so that's what I did. And then this Dave Stallard told

me -- it was a whole group of new KBR employees. Some of us were going to other bases. The majority of them were staying at Al Asad.

So he told us in this meeting those of us who were going to be going to other bases, that while we were waiting to get our flight out, that we were to go to the foreman of whatever our trade was. Mine was to go to the ROWPU foreman at Al Asad and ask him if there's anything we can do while we were waiting, and he will sign off on my 12 hours for the days that I was at Al Asad. So that's the first time I was told to write down 12 hours.

Q. When was that, do you recall approximately?

A. It would have been January-- maybe 18th, [27] 19th, 20th, somewhere in that range.

Q. Of 2005?

A. Correct.

Q. Did you go to the ROWPU site as Mr. Stallard directed you to?

A. I did.

Q. About how many other employees were at this training?

A. I'd estimate maybe 30.

Q. How long did you spend at the ROWPU site?

A. The first day I spent may be an hour and a half, two hours possibly. I was given a tour of the facility, and the ROWPU foreman was going to show me how to turn on the ROWPU, and he didn't know how to turn it on, so he had one of the TCNs that was working there push the on button for me.

And then he signed that I got 12 hours, and so I

went back to the tent.

Q. Who was that?

A. I believe it was a man named Green, Mr. Green. I don't recall his first name. He was a ROWPU foreman.

[28] Q. Anybody else ever instruct to you write down 12 hours a day on your time sheets?

A. Yes.

Q. Who?

A. Walter Meyers.

Q. When did he do that?

A. The day I arrived at Ar Ramadi.

Q. Did he give you any training as to how to record time on your time cards the day that you arrived at Ar Ramadi?

A. I believe so. I think he told me -- you had to designate where you were at, B 4, the base that I was at. Obviously I don't remember what the acronym was, but he instructed me on that and to write down 12 hours and that he had to sign my time sheets because he was my foreman, ROWPU foreman.

The other people that I arrived at Ar Ramadi with was an electrician and an administrative. They went to their foreman and were given the tour, so I don't know what they were told, but that was the next time that I was told was by Walter Meyers.

[29] Q. Any other times?

A. I don't specifically recall. I know that Suzanne Raku-Williams told all of us at a safety meeting on either the first Sunday or the second Sunday that I was in Ar Ramadi that on Sundays we would get our

12 hours but we were to either be playing softball or watching softball or washing our vehicles or cleaning our hooch. I imagine that would have been someone else that would have told me to write down 12 hours.

Warren Smith, I believe, told me in regards to bunker time would indicate you'd get 12-1/2 hours that day instead of just 12.

Q. When was that?

A. That would have occurred within the first couple of weeks that I was at Ar Ramadi.

Q. Anybody else --

A. I believe I was also told that in Houston. I don't recall that it was a specific individual, but it was during our training when they were explaining to us how we were going to -- for instance, my rate of pay, I was told that I would [30] make $84,000 a year and that was based on working 12 hours a day seven days a week, 84 hours a week, so I was told that in Houston.

Q. Is it your understanding that you would be paid based on 12 hours a day, 84 hours a week even if you did not work 12 hours a day, 84 hours a week?

A. That wasn't my understanding. I thought I would be working 12 hours a day before I got there.

Q. Were you ever told by anybody that you would be paid for working 12 hours a day, 84 hours a week when you did not, in fact, work those hours?

A. Yes.

Q. Who told you that?

A. Walter Meyers.

Q. Please tell me about that conversation.

A. That occurred within -- it may have been the first day or the second day that I was there. And the context of that was Walter explained to me that he was a ROWPU foreman, so he was responsible for me. I was to report to him, but we didn't have an operating ROWPU, so I didn't have any work to do, but I could still write down 12 hours.

[31] And he was busy doing work order desk stuff. He made it clear that I didn't have to do anything.

Q. How did he make that clear to you, Mr. Carter? Did he tell you that?

A. He didn't specifically say you don't have to do anything. He said maybe you can go hang out with the plumbers if you want, because I was asking him for things to do. I was ready to work 12 hours a day.

Q. Did he ever tell you that you could record 12 hours a day on a time sheet and be paid for that time regardless of whether you were working?

A. He didn't specifically say it that way.

Q. Did he generally say it that way?

A. Yes.

Q. Tell me how he said that.

A. He told me to hang out in my hooch.

Q. Your testimony, sir, is that Mr. Meyers told you you could hang out in your hooch and record that as work time?

A. Yes.

[32] Q. Can you tell me about that conversation and tell us how it happened to the best of your recollection.

A. Well, again, that occurred the first day or the

second day that I was there. I think the first day he just gave me a quick drive around the base and showed me where the ROWPU trailers were and let me know they weren't operational.

And the second or third day I would just be hanging out there in the operations and maintenance office, which is where Walter was working, and everybody else -- because I was new, all the other crafts and trades people, they would go off and go have breakfast and I wouldn't see them.

I was standing around like what am I going to do? And that's when he suggested -- I asked him if I could get some information on the ROWPU, if he had any books or the policies that I could -- maybe I could go read those, and he said yeah, he gave me what they had -- the little they had.

Q. Did you read those?

[33] A. I did, yeah. I spent probably three days just reading those in my hooch. It was about a two-hour read.

Q. Why did you spend three days in your hooch reading something that would take two hours to read?

A. Because he didn't have anything else out for me to do.

Q. When he told you to go to the plumbers, did you go to the plumbers?

A. Yes, I did.

Q. Let me back up --

A. He didn't tell me to go to the plumbers. He said I could if I wanted to. I said I used to be a plumber, is there anything I can do to help.

Q. He gave you some reading materials. Did he actually tell you to go to your hooch to read those?

A. Yes.

Q. Did he tell you to just go to your hooch to hang out while you were doing no other work?

A. Yes, to not be seen.

Q. Tell me, as best you can recall, what he [34] actually told you.

A. I think he -- after that first day, I seem to recall that he told me that he was really busy at the time, so he didn't have time to really spend with me on the ROWPU. So he told me once he got -- whatever these issues were he was working on worked out, that maybe he'd be able to spend more time with me.

So in the meantime, to just hang out in my hooch. Told me where the DFAC was to go eat, and he would get back with me. So the very next day that's when -- I became a nuisance to him. It was obvious I couldn't hang out in the operations and maintenance office because it was a small office, and I couldn't stand being inside my hooch all day.

So I started asking him if there was things that I could do, and I mentioned that I used to be a plumber, and so he told me who I could go talk to, the plumbing foreman. Because at this time I didn't know anybody there. I was brand-new.

Q. How long after your arrival did this happen?

[35] A. Three or four days, I believe.

Q. Your testimony is that Mr. Meyers instructed you to go to a hooch when you were not working, but to record 12 hours a day for that time?

A. Correct.

MR. MAGNANINI: Objection to form, but you can answer.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. And he did that in one conversation, several conversations?

A. He did that numerous times over the entire time that I was working there. When I say "numerous times," he would direct me to what hours to write down so that everybody's hours jibed.

Q. What do you mean by "everybody's hours jibed"?

A. Initially, we kept our own time sheets on our possession like we were told in Houston to do. It was important that we keep our time card on our person in case a DOD inspector, I think, asked for it. We were supposed to be able to present it and [36] show it to him right there on the spot.

But that changed sometime in February, I think. And Walter Meyers and Tom Smith required that we leave our time sheets in the O&M office, in Walter's office, and we would then fill them out at 7:00 p.m. in front of Walter and Warren Smith.

And Walter required of me that I be responsible for Dale Lehew, the ROWPU operator underneath me so his hours matched my hours because Dale -- there was a couple times Dale made mistakes with his math. I don't know what Dale was doing while I was writing down my 12 hours. During the day I don't know what he was doing.

So Walter instructed me to take care of Dale Lehew's time sheet and make sure he wrote the same

hours I did, so that was another time.

Q. He actually instructed you to write down the same hours as Dale Lehew?

MR. MAGNANINI: Objection to form.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. Regardless of the number of hours that you [37] or Dale Lehew worked?

A. Correct.

Q. Is that what he actually told you?

A. No. He didn't say regardless of what hours we worked. He said make sure Dale gets his time sheet correct with your time sheet. He said Dale's your responsibility because you're going to be the ROWPU foreman.

At this time Walter had let me know that I was going to be taking over his job as ROWPU foreman. So Dale was now my underling, so he told me to make sure Dale's hours reflected the same hours that I had.

Q. Did you understand what a supervisor's responsibility was with respect to a subordinate's time card?

A. No, I didn't. If you'd like me to elaborate a little on that -- I assumed that Walter was being the operations and maintenance manager, so he was -- he was in control of everybody's time sheets in crafts and trades, the electricians, the carpenters, and so he oversaw all of that.

[38] So I just assumed that he had authority over all of our time sheets because he would occasionally, after 7:00 p.m., he would get on the radio and occa-

sionally call in an individual to come back to his office to correct their time sheet. That happened to me several times before he made it abundantly clear I had to make sure Dale did his time sheet right before I left at 7:00 p.m. Walter would call me on the radio to come back to his office and get Dale to correct his time sheet.

Q. What would he ask you to correct?

A. The hours. If I had written down 12-1/2 hours, Dale needed to write down 12-1/2 hours, too. My understanding of his authority over the time sheet was that as the O&M manager, work desk ordered manager. That was as much as I knew.

Q. What about your responsibility over Dale Lehew's time sheet once you were the acting ROWPU lead?

A. I didn't like it.

Q. I'm asking, do you have an understanding of what your responsibility was as the acting ROWPU [39] lead over Dale Lehew's time sheets?

MR. MAGNANINI: Objection to form.

THE WITNESS: My understanding from what Walter told me, that I needed to make sure Dale wrote down the same amount of hours as I did so I understood I was responsible for that, to make sure that he added it correctly and not just write 12-1/2 hours but also to add up the entire week and come to the same number at the end of the week. It was made clear to me that was my responsibility, to make sure that Dale create a clean time sheet.

BY MR. MARGOLIS:

Q. What do you mean by "a clean time sheet"?

A. Without corrections on it. If you wrote down 12-1/2 hours on Tuesday and then only 12 hours on Wednesday, but we had bunker time and he didn't account for the bunker time, he would have to cross that out and put his initials on it and correct it and then put 12-1/2.

And Walter wanted me to avoid that by just guiding Dale through to write down -- Dale would [40] stand next to me and write down exactly what I wrote down. As I was filling out my time card, he would fill out his right next to me to avoid those corrections on the time sheet.

Q. Was there ever an instance where Dale had put down on a time sheet less than 12 hours and you were instructed by Walter Meyers to increase Dale's time to match 12 hours?

MR. MAGNANINI: Objection; form, but you can answer it.

THE WITNESS: I don't recall.

BY MR. MARGOLIS:

Q. You don't recall that happening?

A. I don't. It may -- if I could look at his time sheets, I could probably remember, but at this point in time, I don't remember that.

Q. How would you know that from looking at a time sheet?

A. By comparing his to mine.

Q. There's an allegation in the case that the time cards are false. What about them are false?

MR. MAGNANINI: Objection to form, but you [41] can answer.

BY MR. MARGOLIS:

Q. To be more specific, the time cards of certain ROWPU employees, including yourself at Camp Al Asad and Camp Ar Ramadi from January 2005 to May of 2005 were false. What about them were false?

A. I think I can speak specifically to mine and to Walter's and to Dale Lehew's. What was false about them is on the time sheet it said I was a ROWPU operator. Dale Lehew was a ROWPU operator. Walter Meyers was a ROWPU foreman. We all wrote 12 hours per day, sometimes more, and none of us were doing any ROWPU work, so that was false.

Q. Anything else about them that was false?

A. Yes. On Sundays when we had the day off, we all wrote 12 hours, and we weren't doing anything.

Q. Anything else about them that was false?

A. Nothing that comes to mind.

Q. Can you speak to whether or not time cards for any employee at Al Asad was false during the time you were there in January 2005?

[42] A. Yes. I know that mine were because I was instructed to write down 12 hours, and then I had -- I was instructed to have the ROWPU foreman certify that I worked 12 hours at the ROWPU, and I didn't.

Q. But for other employees at Al Asad when you were there?

A. Yeah. Everybody that was waiting to transition was told to go to their particular manager and get him to sign off on your 12 hours, so those are false.

Q. Do you know whether or not the other employees that were receiving those instructions who went to the other trades weren't doing work?

A. I do, yes.

Q. How do you know that?

A. Because they told me.

Q. Who told you?

A. Joe Huffines specifically. He was an electrician that ended up at Ar Ramadi with me. There was an HVAC guy -- I can't remember his name -- but he was in my same group. He told me that that's what they did. They went to see their [43] foreman and they signed off on the 12 hours, and we all met back at our tents and went to the PX and walked around the base and went back and went to sleep, so those were all false.

Q. What about ROWPU employees that were stationed at Al Asad? Do you have any knowledge about the falsity of their time card?

A. Not specifically. I would say other than what Dale Lehew told me about what occurred at Al Asad with the ROWPU there. He had worked there prior to coming to Ar Ramadi and they were seriously overstaffed so there was nothing for him to do with the ROWPU at Al Asad, but he still got 12 hours to work, but wasn't performing any work.

Q. Did he tell you whether or not he was at the ROWPU site for 12 hours a day at Al Asad when he was recording time?

A. He didn't specifically tell me he was there the full 12 hours.

Q. Did he tell that you he wasn't there the full 12 hours?

A. I don't believe he did.

[44] Q. What about any other ROWPU employee at Al Asad in January 2005? Do you have any knowledge with respect to the accuracy of any other ROWPU's time cards in that period of time?

A. I do, now that I think about it. The ROWPU Foreman Green told me -- this was when he was explaining to me about the TCNs that were working there at the ROWPU site. He explained to me they do all the work. They fill the trucks with the water and that we just supervise them. We don't really do much is what he said, but the TCNs do all the work.

They treated them like slaves. They were horrible to those guys. So I took that to mean we don't have anything to do from the ROWPU foreman.

Q. Is that what he said?

A. He didn't say we don't have anything to do. He just said the TCNs do all the work.

Q. Did you see Mr. Green's time cards?

A. No.

Q. Do you know whether or not Mr. Green was at the ROWPU site for 12 hours if he was recording 12 hours on his time cards?

[45] A. I do not.

Q. Anything else about the accuracy of time cards for any ROWPU employee at Al Asad during the time you were there?

A. No.

MR. MAGNANINI: Craig, if it's a good time, can we get a break?

MR. MARGOLIS: One last question.

BY MR. MARGOLIS:

Q. When did you meet Dale Lehew for the first time?

A. The morning after he arrived at Ar Ramadi. He arrived at night. I was told by his roommate, Joe Huffines, that they sent another ROWPU guy over. And I said why? I don't know when he arrived. It was in February, I believe, only a couple weeks after I got there, I think.

Q. So not at Al Asad?

A. No.

MR. MARGOLIS: Okay.

VIDEO OPERATOR: Off the record at 10:34.

(Recess.)

* * *

[46] VIDEO OPERATOR: Back on the record at 10:47.

BY MR. MARGOLIS:

Q. Mr. Carter, turning to Ar Ramadi, you testified about Sunday's softball. You testified about time you spent in your hooch. Is it your understanding that for days that you recorded time working on those occasions, that rendered your time card false?

MR. MAGNANINI: Objection; form.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. I should have asked a predicate question. The time you spent in your hooch at the time you testified when you first arrived at Ar Ramadi, is that time you recorded on your time card as work time?

A. I did.

Q. Is it your understanding that rendered your time card false?

A. It is.

Q. Did you play softball on Sundays yourself?

A. I did.

Q. How many times?

A. To my recollection, it was only twice. It may have been three Sundays. I don't specifically recall. I think it was two.

Q. Two Sundays?

A. Two games, yes.

Q. One game on each Sunday?

A. Correct.

Q. How long did the games last typically?

A. I would guess an hour and a half maybe.

Q. What did you do with the remainder of the time on Sunday?

A. One time I went to a church service with another KBR employee. I go eat, wash my truck, once I got a truck assigned to me. I washed the truck. We all pretty much washed trucks on Sunday; did my laundry sometimes on Sunday. Oftentimes that was during the week, too, suntanned.

Q. Did you have safety meetings on Sundays?

A. We did, yeah. That was the only work-related work, in my view, that I did on Sundays [48] was every Sunday, I think they called it a safety stand down meeting. That was held in the DFAC.

Q. How long would that last?

A. I think about an hour, hour and a half. They varied depending on who was speaking. I seem to think it was about an hour.

Q. On the two times that you played softball, did the KBR group play as a team?

A. Yes. I think one time we played some of the Marines, and another time we played two teams of KBR employees.

Q. From -- other KBR employees from Ar Ramadi or from some other location?

A. Correct.

Q. From which?

A. From Ar Ramadi. I think it was in that game one of the KBR employees got hurt, so that would be documented because he had to go to the medic.

Q. Aside from the safety stand down meeting, your testimony is you did no other work-related activities on Sundays?

[49] A. To the best of my knowledge-- to the best of my recollection, it was five years ago, you know. If I had the benefit of looking at all my time sheets, there may be one time sheet on a Sunday I may have actually itemized something I actually did, so I don't want to commit that I didn't do anything on any of the Sundays, but generally no.

Q. Starting at the time -- and we'll discuss this in a little bit more detail later --that you became actively involved in preparations for KBR's ROWPU operator at Ar Ramadi, do you recall that time frame?

A. I do.

Q. When would you place that, when you started working actively and setting up KBR's ROWPU?

A. I believe that was approximately the last two weeks that I was there at Ar Ramadi.

Q. Just the last two weeks of March? Is that what you're saying?

A. Correct.

Q. Before that, you weren't doing work setting up the KBR ROWPU?

[50] A. Very little. I won't say that I wasn't doing any. There would have been maybe an hour one day. I was prevented from getting access to the ROWPU until Walter Meyers left on his R&R. That's when I finally got the keys to even go in the trailers or in the office that was there, so I couldn't have done much.

But there was one occasion that the Waterworks personnel arrived at Ar Ramadi who were going to start up the ROWPU, and I did a little bit of work with helping them get billeting, where to stay, but it wasn't ROWPU work really. It was just something to do.

Q. During the last two weeks that you were there on those Sundays, where you were actively engaged in setting up the ROWPU, were you doing work on those Sundays setting up the ROWPU?

A. I don't believe so.

Q. Aside from Sundays, then, and the time you spent in your hooch, is there another time you can recall recording that you didn't actually work?

A. My feeling was that I recorded about 8 [51] percent of my time as work when I wasn't doing anything. Specific days, I can't mention specific days, but generally overall, my hours were just written down as 12 hours when I wasn't doing anything.

Q. 80 percent of the time you would say you weren't working?

A. Correct.

Q. Were you at the work site during some of that time you weren't working, or are you saying you were in your hooch that entire time?

A. Towards the end, when I finally got the keys given to me to the ROWPU site, I did some work in terms of – I was able to arrange to have a generator placed at the site so I would have electricity at the ROWPU office, and I did that so that I would have a place to hang out rather than in my hooch.

So I had an office, and I could be out of sight that way rather than driving around the base in circles. So there was a little bit of activity on my part to establish an office at the ROWPU site, [52] so I had a place to go.

Q. How about the time you spent with the plumbers? That wasn't in your hooch; right?

A. Right. It was mostly in Kevin Voitlen's hooch. I don't know if that's how he pronounced his last name, V-o-i-t-l-e-n, I think. He drove me around the base for a couple hours one day and again the next day, and then we'd go to the MWR and play ping-pong, I think, and go back to his hooch, and I'd stand there while he was on his computer for a while until it was just so uncomfortable, and then I'd go back to my hooch.

So that was when I went back to Walter Meyers and said they don't have anything for me to do, is there anything else I can go do.

Q. What about the time you spent with the carpenters? Where would you spend that time?

A. At the carpenter shop.

Q. Did you spend 12 hours a day on the days you were at the carpenter shop?

A. No.

Q. How much time would you spend at the [53] carpentry shop on the days you were there approximately?

A. Let's see. We'd normally get out there about 8:00, I think. We'd go to breakfast at 7:00 after the meeting with Walter. We'd get out there about 8:00, stay until 12:00, go in and have lunch, and some days I'd go back out with them in the afternoon. Other days I'd just stay in my hooch.

We'd stay out there until 3:00 or 4:00, I believe, and we'd go back in. It was the furthest point away from the KBR man camp on the base, so it was a drive of maybe half a mile, so we were out of sight and out of mind.

Q. Do you remember how many days you went back to your hooch in the afternoon as opposed to staying at the carpentry shop?

A. I would say generally during February, I spent most of the days out at the carpenter shop building entertainment centers, stuff for my co-workers and their hooches. So generally, I would be out there more often than not in February.

Q. You mentioned a morning meeting with [54] Walter Meyers. Can you tell us about that?

A. Yes. That was required attendance every morning at the O&M office for the crafts and trades people, and they were to be there at 7:00 a.m. Walter Meyers was there. Harry Grocholski, the electrical

foreman and Warren Smith and that was when we would be told by Walter. He would hand out work orders to primarily the HVAC people. They had actual work to do pretty frequently and he would discuss business of the day or whatever was coming up, and we were released to go to breakfast.

Q. How long would those meetings take typically?

A. I'd estimate 10 minutes.

Q. This happened every day?

A. Yes. I take that back. I don't think they happened on Sundays. I think we went to the safety stand down meeting at around 9:00 or 10:00 a.m. on Sundays, so we didn't have to go to Walter's office on Sunday.

Q. Is there any time at the time that you spent at Ar Ramadi that you believe that you [55] accurately recorded your time on a time sheet?

MR. MAGNANINI: Objection to form.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. When was that?

A. During those last two weeks that I was there actively trying to get the ROWPU operating, and the day that I went out to the military police building and helped build that wall and the two days that I helped with building of a guard tower for the military.

Q. Any other days?

A. The day that we did the garbage pickup, but I wasn't happy about it. It was just something -- it was make work. It was 12 hours.

Q. Was there garbage to pick up, Mr. Carter?

A. I don't recall picking up any. We just drove around. I don't remember picking up any.

Q. What about the time you spent helping the electricians to avoid shorts in the rainstorm?

MR. MAGNANINI: Objection to form.

BY MR. MARGOLIS:

[56] Q. Was your time sheet correct on that day?

A. No.

Q. Why not?

A. Because in that particular instance, that occurred after 7:00 p.m., this was in the dark. This was maybe about 10:00 at night and, to my recollection, I wrote down 12 hours but not extra hours for that work that we did that night. So I felt good about helping in an emergency, but it didn't seem in my mind to apply to the 12 hours earlier during the day.

Q. We'll talk about this in some more detail a little bit later on, Mr. Carter, but you understood that your pay was based on the hours that you reported on your time sheet; correct?

A. Yes.

Q. And you understood the greater number of hours you recorded on the time sheets, the more money that you would be paid?

A. I did.

Q. Did you have an understanding that that, in turn, led to KBR to bill your time to the [57] government based on the hours you recorded on your time sheets?

A. I did.

Q. Are you saying that 80 percent of the time that

you recorded is time for which you should have never been paid? Is that your testimony?

MR. MAGNANINI: Objection to form.

THE WITNESS: It's not.

BY MR. MARGOLIS:

Q. So you think you should have been paid regardless of whether or not you were working?

A. Morally, no. Legally, yes. I believe they should have paid me. They told me I was going to be a ROWPU operator, and how KBR does their business wasn't my concern.

Q. What's your basis for thinking KBR had a legal obligation to pay you for time you didn't work?

A. Because that was the case with everybody that I met over there. That's where I learned about kick back and relax. Everybody got 12 hours at least.

[58] Q. Are you saying that created a legal obligation for KBR to pay you for hours you didn't work?

MR. MAGNANINI: Objection to form.

THE WITNESS: I don't know if it was a legal obligation.

BY MR. MARGOLIS:

Q. Have you refunded any of the money you were paid by KBR through either KBR or the government for work and time you didn't spend doing?

A. No.

Q. Do you have any intention to do that?

MR. MAGNANINI: Objection to form.

BY MR. MARGOLIS:

Q. Haven't thought about it before now?

A. Haven't really thought about it.

Q. How much did you get paid by KBR for the time you spent in Iraq, Mr. Carter?

A. I don't really specifically recall other than that $84,000 is what I would make if I worked there for a year working 84 hours a week. I don't recall what the monthly paychecks were. I don't [59] know.

Q. Other than the persons you testified about earlier, I believe Mr. Smith, Mr. Meyers and Suzanne Raku Williams at Ar Ramadi and the other individuals about whom you testified at Al Asad, did anybody else direct you to correct your time sheet from KBR?

MR. MAGNANINI: Objection to form. But you can answer.

THE WITNESS: I can't think of a specific individual. I know that it happened when I transitioned from Dubai to Al Asad because I remember having to make a correction and somebody told me how to make that correction and I needed to do it. I don't know who that person was.

BY MR. MARGOLIS:

Q. How about at Ar Ramadi, any other persons other than whom you testified about so far?

A. I don't believe so.

Q. There's an allegation in this case that time cards were submitted to the government. Do you have that understanding yourself, sir?

[60] A. I do according to what they told me in Houston.

Q. What did somebody tell you in Houston about whether time cards were actually submitted to the government?

A. It was during our training -- I think it was specifically when they were discussing the LOGCAP in Houston. They, numerous times, went over how important our time cards were and the hours we wrote down were what the government was going to be paying us for the service we were doing.

So we had to be accurate with our time cards. It was my understanding that the time card was the bill, essentially. Having been a business owner, that's how I looked at it, is that you submit the time cards is essentially the same as submitting an invoice to the government.

Q. Did anybody from KBR at any time tell you that a time card was directly submitted by KBR to the United States government?

A. I believe they did. I believe that David Stallard said that and the trainers in Houston.

[61] That was my understanding, that our time cards were how the government was billed.

Q. Were you ever on the billing side at KBR?

A. No.

Q. Do you know anything about how KBR bills the government aside from what you've just testified about?

A. I'm trying to think of -- you know, I don't want to say no, I don't know anything about it because I would talk with Ken May in the administrative office, and they'd make announcements that we need to get the time cards all in early on Saturday night so we can submit them so you can get paid on time. That's the extent of my knowledge about that.

Q. Are you familiar with the Federal Acquisition Regulation?

A. No.

Q. Do you know how it operates with respect to KBR's billings to the government?

A. No.

Q. Are you familiar with the Public Voucher [62] and what that is?

A. No.

Q. Do you know what billing support, if any, KBR is required to maintain to bill the government?

A. I don't think so.

Q. Are you familiar with the term "work breakdown structure"?

A. No.

Q. So you don't know what that is?

A. No.

Q. Do you know how award fees work under the LOGCAP contract?

A. Vaguely.

Q. Tell us what your vague understanding is of that.

A. I believe my understanding of that -- first of all, start with where I got the information. I believe my understanding of that has been what I've heard in the press about KBR's being granted awards for doing their job right. If that's what we're talking about--

Q. I just asked for your knowledge.

[63] A. That's my knowledge. And they would get award fees -- oh, actually, David Stallard talked

about this in Al Asad in our meeting. It had to do with when he was explaining this is a cost plus contract, and it's not a very good contract because we only make 2 to 3 percent over costs, which I knew was a crock because I love a cost plus contract.

But he stated if they do submit all the bills and do all the work, KBR can receive essentially bonuses from the government. That's all I know about it.

Q. You say that's a crock. What's that based on?

A. Based on being a business owner. In my past experience as a business owner, if I could bill a customer and I was guaranteed profit on everything I billed them, I'd be happy as could be. I couldn't lose.

Q. Have you ever contracted with the United States under a cost plus contract?

A. No.

Q. Is your understanding, then, that KBR was [64] entitled to recover, as you say, a fee or profit based on all costs that it incurred?

MR. MAGNANINI: Objection to form.

THE WITNESS: That's my assumption.

BY MR. MARGOLIS:

Q. Is that what that is, an assumption, sir?

A. Yes.

Q. There's an allegation in this case that KBR provided bottled water to personnel at Al Asad. Are you familiar with that allegation, Mr. Carter?

A. I'm not.

MR. MAGNANINI: Objection to form.

THE WITNESS: I'm not.

BY MR. MARGOLIS:

Q. Do you know where the bottled water at Ar Ramadi came from?

A. No, I don't know where it came from specifically. I knew the labels were in Arabic.

Q. Where did you get bottled water while you were at Ar Ramadi, at what location?

A. It was scattered throughout the base in pallets.

[65] Q. Do you have any idea who procured it as between the United States or KBR?

A. I don't.

Q. You have no basis to believe that KBR procured bottled water for the military at Ar Ramadi?

7 MR. MAGNANINI: Objection.

THE WITNESS: I don't know anything about it.

BY MR. MARGOLIS:

Q. Like I said, we're going to go back and talk about your background and education. Can you please tell us about your background and experience prior to working with KBR relating to water purification.

A. Yes. I was initially a plumber, and I had some experience -- that would have been my first exposure to water purification, was as a plumber in Colorado primarily with chlorinators, for private wells, things like that.

Q. Did you work on a ROWPU unit during that time?

[66] A. No.

Q. How long were you a plumber in Colorado?

A. I don't recall, a couple years, I think. I had been a plumber before that in Utah, but specifically the one in Colorado because that was my first time I ever heard of a chlorinator. I didn't know anything about water treatment.

Q. How many years all together did you work as a plumber, Mr. Carter?

A. I think six or seven. You know, there was a period I actually worked as a plumber in 1995 or '6, I think it was for about a year, which was after I owned my own water treatment business.

I would say in terms of the plumbing experience, probably seven or eight years.

Q. For that period of time -- let me go back and ask a better phrased question.

Of that time frame, how much of that time were you self-employed as a plumber as opposed to employed by someone else?

A. None.

Q. Which? I'm sorry.

[67] A. I was never self-employed as a plumber.

Q. So you've worked for seven to eight years for other plumbing outfits?

A. Correct.

Q. Part of that time you testified was in Utah; is that correct?

A. Correct.

Q. Part of that time was in Colorado?

A. Yes.

Q. Any place else?

A. No.

Q. During any of the time you worked as a plumber, did you have any experience operating a ROWPU unit?

A. No.

Q. You mentioned that you had a water purification business; is that right?

A. Yes.

Q. When was that?

A. That was in the mid-'80s to mid-'90s, I think it was up until 1995.

Q. Is that Air and Water Technologies, [68] Incorporated?

A. Yes.

Q. I'll represent there's an interrogatory response provided to Defendants stating the time frame from 1990 to 1995. Does that sound accurate to you?

A. Yes.

Q. Was that your first experience in water purification, or did you have prior experience?

A. Prior experience.

Q. Can you tell us about that, please.

A. Yes. I took a job with a Culligan Water Conditioning business.

Q. What is Culligan Water Conditioning?

A. They do primarily residential point of use water purification, but I was fortunate with the company I went to work for, that we did a lot of private wells in a rural setting. It was a broad spectrum of a variety of water contaminants that needed to be

treated. It wasn't just water softeners or reverse osmosis. It essentially covered the full spectrum of water treatment, short [69] of deionized water.

Q. Did you work on reverse osmosis purification during the time you were at Culligan Water Conditioning?

A. I did.

Q. Was it a ROWPU unit or different type of purifying machine?

A. Well, in the classic sense of a ROWPU unit, I think what people consider a ROWPU unit may be in consideration of the ROWPU units for KBR, they're a skid mounted turnkey unit.

But a ROWPU unit, in my understanding, is a reverse osmosis water purification system, rather than unit. So to go on about that is this could include a water softener, water filtration, ultraviolet disinfection, chlorination, all of that would be part of the ROWPU. And so I did a lot of that, yes.

Q. Would at least one part of the purification process that you're talking about involve the pushing water through reverse osmosis membrane at high pressure to purify it?

[70] A. Yes.

Q. Why did you leave Culligan Water Conditioning?

A. To start my own business.

Q. On the interrogatory response, it states that you were employed at Culligan from 1987 to 1989. Does that sound accurate to you?

A. It does.

Q. At Air and Water Technologies, did you also work on reverse osmosis purification systems?

A. Frequently, yes.

Q. Did you install them?

A. I did.

Q. Did you operate them?

A. I did.

Q. Did any of the units that you installed and operate have the same configuration as the ROWPU units that you later worked on in setting up for KBR at Ar Ramadi in the spring of 2005?

MR. MAGNANINI: Objection to form.

THE WITNESS: It didn't have the exact same configuration.

[71] BY MR. MARGOLIS:

Q. Similar?

A. Yes.

Q. Is it your general experience that at a basic level ROWPU systems operate essentially similarly from system to system?

A. Except for the difference between low pressure and high pressure RO systems. I think that's a significant difference.

Q. Did you work on both types of systems during the time you were at Culligan and Air and Water Technologies, Inc.?

A. I did.

Q. The systems that KBR was operating or was standing up to operate at Ar Ramadi in the spring of 2005 was a high pressure system; is that right?

A. I believe it would correctly be called a high pressure. They're higher pressure units, but that one I would consider high pressure.

Q. Did you have any question about your ability or knowledge to be able to stand up and [72] operate the ROWPU unit that KBR had in the spring of 2005 at Ar Ramadi based on your prior experience?

MR. MAGNANINI: Objection to form.

THE WITNESS: None whatsoever.

BY MR. MARGOLIS:

Q. And that would be the case even though you had never worked on that specific configuration of ROWPU before; is that correct?

A. Yes, I suppose so. I was fami'iar with all of it. There was nothing there that I hadn't seen before.

Q. Are you familiar with the different types of manufacturers of ROWPU, for example, Baskel unit versus a Waterworks unit? And I'm going to spell Baskel for our court reporter, B-a-s-k-e-l.

A. I have very limited knowledge about that. I'm aware they exist. I know about Waterworks, their company. I don't know anything about the other manufacturer. I've heard the name.

Q. You don't know whether there's something that would be unique to a Baskel unit versus a Waterworks unit, for example, that you would not [73] know how to operate it?

A. I can't imagine they would have anything that I wouldn't have prior experience with, but I don't know. I don't know what they have in them.

Q. You say you can't imagine that because at some level the ROWPU units are similar enough that

you believe you'd be able to handle a unit from a different manufacturer?

A. Exactly.

Q. Why did you stop your business at Air and Water Technologies, Inc. in 1995?

A. I wanted to retire and go to law school.

Q. You did not attend law school; is that right?

A. That's correct.

Q. Why not?

A. I got divorced.

Q. Was the business a successful business until the time that you retired?

MR. MAGNANINI: Objection to form. You can answer.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. I should define "successful." I'll call it turnover. How much money did you do in business a year?

A. Close to 200,000.

Q. Have any employees?

A. Yes.

Q. How many?

A. At any one time, I think at the most I had three.

Q. Was there a time when you worked at Echo Water of Utah in 1998?

A. Yes.

Q. What did you do for Echo Water in Utah?

A. I was an independent contractor salesperson. I sold water purification equipment. I did the water analysis and then the application of the appropriate equipment and did the presentation and made the sales so I was a salesman.

Q. What kind of company was Echo Water?

A. Very similar to Culligan, mostly a residential water purification manufacturer.

[75] Q. Were any of the units that you were involved in selling for Echo Water reverse osmosis units?

A. Yes.

Q. How long were you at Echo Water?

A. I don't really recall. I think it may have been a year. It was kind of an informal -- I wasn't paid by the hour, so I worked when I wanted to. Maybe a year.

Q. Why did you leave?

A. I think I moved to Montana.

Q. Why did you -- actually, your next position was in Cedar -- according to the interrogatory was in Metalcraft Technologies, Hansen Mechanical Plumbing and Willow Glen Inn in Cedar City, Utah in 1998 to 2000?

A. That's right. I moved to Montana temporarily for like three months in the summer after Echo Water.

Q. Why did you leave Echo Water?

A. Because I wanted to go to Montana and fish.

[76] Q. You weren't terminated?

A. Oh, no.

Q. Was that your -- prior to the time you worked at KBR, was that your last job in the water purification business?

A. Not exactly. I did some with Hansen Mechanical.

Q. Is that a plumbing company?

A. Yes.

Q. What type of water purification work did you do for Hansen Mechanical?

A. I did some sales for them to introduce a new revenue stream for the business, so I did water analysis and sizing.

Q. Did any of that involve reverse osmosis work?

A. Yes.

Q. Why did you leave Hansen Mechanical Plumbing?

A. I don't recall.

Q. Were you terminated?

A. No. I don't know-- this is a long time [77] ago.

Q. I understand. Your best recollection.

MR. MAGNANINI: Do you want to show him the exhibit?

MR. MARGOLIS: Yeah. It might assist you. Can we mark this as Defendant's Exhibit 42.

(Defendant's Exhibit 42 identified.)

BY MR. MARGOLIS:

Q. Mr. Carter, I'm handing you what's been marked as Defendant's Exhibit Number 42. You'll see it's a document titled "RELATOR'S ANSWERS TO DEFENDANT'S FIRST SET OF

INTERROGATORIES." Do you see that?

A. I do.

Q. Could you turn to the last page of that document first, please, do you see there's a signature that appears on that last page, sir?

A. Do.

Q. Is that your signature?

A. It is.

Q. Did you review the interrogatory responses before you signed it?

[78] A. I did.

Q. Did you review that to ensure it was accurate to the best of your knowledge and belief at the time you signed it?

A. Yes.

Q. Is that true of the other interrogatory responses made by your lawyers in this case?

A. Yes.

Q. You reviewed those and signed them as well?

A. Yes.

Q. And you assured those were accurate to the best of your knowledge and belief before you signed them; is that right?

A. Yes.

Q. If you could please turn to page 67 of that document. This appears to be essentially, for lack of a better word, a CV or resume of your professional experience; is that right?

A. Correct.

Q. Directing your attention to the entry from 1998 to 2000, which is where we left off, you were [79] at Cedar City, Utah employed at Metalcraft Technologies, Hansen Mechanical Plumbing and Willow Glen Inn. Do you see that?

A. I do.

Q. After that you went to Denver, Colorado and you were employed by Kloppenberg Metal Fabrication. Do you see that?

A. I do.

Q. Do you know why you left Hansen Mechanical Plumbing?

A. I don't recall the order that these were in, Metalcraft, Hansen, Willow Glen. I don't remember, to tell you the truth, which one came first, if I was working at metal work and went to Hansen or Hansen -- they weren't for a long period of time. I don't remember.

Q. What did you do at Kloppenberg Metal Fabrication?

A. I was a press break operator, so I was doing stainless steel metal fabrication like medical equipment.

Q. Did you ever do any electrical work during [80] the time you spent, for example, working on water purification or in other jobs?

A. Yes.

Q. Can you tell me a little bit about that?

A. Yes. I did very little. I wasn't like installing circuit breaker boxes and stuff. But it started with my plumbing career where I would do connecting water pumps to the control panel so essentially connect-

ing components electrically.

Q. Are you comfortable with doing basic electrical work of that kind?

A. Yes.

Q. We haven't spoken yet about your carpentry work, but you're also comfortable doing plumbing work, I assume?

A. I am.

Q. Willow Glen shows up at a couple points in this CV. What is the Willow Glen Inn?

A. That's my parent's bed and breakfast business.

Q. Where is that located?

A. In Cedar City, Utah.

[81] Q. Do they continue to own it, operate?

A. Yes.

Q. Why did you leave Kloppenberg Metal Fabrication to work at your parents' bed and breakfast in 2001?

A. Because I decided I didn't like my girlfriend in Denver, so I left.

Q. Any issues with the employer, Kloppenberg Metal Fabrication?

A. Other than I think that's the only employer I didn't give a two-week notice to, and I felt bad about that. I called them, though, and told them I was sorry I didn't give them a two-weeks' notice. I left abruptly.

Q. Why did you leave abruptly?

A. Because I wasn't getting along with the woman I was living with, and my son was living with me and her at the time, so I needed to extract him from that

situation.

Q. After you moved to Utah, you started your own log furniture business; is that right?

A. Yes.

[82] Q. That's Carter Creations?

A. Yes.

Q. And that business was going for about four years, according to this chronology; right?

A. Yes.

Q. From 2001 to 2005?

A. Correct.

Q. Using the same definition we used before when we were talking about your other business, was that a successful business?

A. Yes, in a different regard. It was more of a – kind of a mom and pop. It wasn't a full-fledged, this business is going to grow and I'm going to sell it.

Q. Did you have any employees?

A. Occasionally one at a time. I would hire people to help sand logs, things like that, but it was more of just a way of making a living and live in the mountains.

Q. What were your annual sales from that approximately?

A. I believe around 80,000, maybe 90,000. I [83] don't exactly remember. My wife at the time was much more in control of that than I was. I was doing the work and she ran the money.

Q. How would you be paid typically, cash, check, credit card?

A. Mostly check. We didn't take credit cards.

Q. Was Carter Creations a separately incorporated or registered business, or was it a DBA?

A. No. DBA.

Q. Did you pay taxes on the money that you received as income from Carter Creations log furniture?

A. I believe so. Once again, that would have been my wife's at the time work. I later found out that she had bank accounts I didn't know about, so I don't know anything about the money really.

Q. Did you sign your tax return, sir, when it was filed with the IRS?

A. Yeah.

Q. Did you review it before you signed it?

[84] A. Yeah.

Q. Did you have any other income during the time you were working at Carter Creations log furniture aside from whatever income would have been derived from that business?

A. I don't believe so.

Q. Did you record as income the money that you received from Carter Creations log furniture from 2001 to 2005 on your annual tax returns with the IRS?

A. Yes.

Q. Why did you stop working in the furniture business?

A. Because I accepted this job with Halliburton.

Q. After you left Halliburton -- KBR, have you had any employment since that time?

A. I attempted to, immediately after I returned from Iraq, I attempted to start -- reincarnate the log furniture business, to start it up in Great Falls, Montana. And I did that for about three weeks, and I was just unable to do the [85] work, so I had to return the deposits from the people that had ordered furniture. Other than that, no.

Q. Where do you live now?

A. Boise, Idaho.

Q. Was there a time frame -- if you could turn to page 68 of that exhibit in front of you, sir. At the top it says from 2005 to 2006, it mentions a number of different places that you lived and also mentions you were employed by the Willow Glen Inn. Did you do any work for your parents' bed and breakfast during that time?

A. Yeah, but I don't think they paid me. I may have done a little bit of helping around the yard. I don't recall. I wasn't on the payroll. That I know.

Q. Have you ever been convicted of a crime, sir?

A. I have.

Q. Tell us about that.

A. Pardon?

Q. Can you tell us about that, please.

[86] A. Yeah. I pled guilty to a couple DUIs and assault on a police officer.

Q. Did the assault on the police officer happen while you were intoxicated?

A. Yes.

Q. When was that?

A. I'm thinking like maybe 1996. It occurred right

after my divorce so whenever that was.

Q. When was the last time you were convicted of a crime?

A. That would have been it, was in 1996 if it was in '96 or '95.

Q. How many driving under the influences convictions do you have, DUI convictions?

A. I think three.

Q. You say the last of which was in 1995?

A. Right.

Q. Aside from those, have you ever committed any criminal offense?

MR. MAGNANINI: Object to the form. You can answer.

THE WITNESS: Have I ever committed – I [87] don't believe so. I pled guilty to what was at the time called burglary of a dwelling. I got in a fight with one of my girlfriend's lovers. I pled guilty to that, but I don't believe I committed a crime. So specifically no.

BY MR. MARGOLIS:

Q. You pleaded guilty to something you did not believe to be a crime?

A. Yes.

Q. Didn't you have to admit in court that you committed that offense in order to plead guilty to it, sir?

A. I believe so.

Q. So you're saying you lied when did you it?

A. No. I didn't believe it was a burglary. My interpretation of what a burglary is is someone who

breaks into a house. I didn't break in.

Q. How did you plead guilty to an offense that you believe you didn't commit?

A. Because the public defender suggested that I do that.

[88] Q. And you were willing to do that?

A. I was.

Q. And admit to the offense in court?

A. Correct.

Q. Notwithstanding the fact that you did not commit the offense?

A. Technically, correct.

Q. Did you believe you committed the offense or not?

A. No. I believe I got in a fight with this guy, physical altercation, but I didn't burglarize anything. I have never stolen anything.

Q. At the time you pled guilty, you were placed under oath like you are today; isn't that correct, sir?

A. Yes.

Q. Any other time? Have you committed any other crime aside from the ones we've discussed?

A. I got a speeding ticket once.

Q. Aside from the traffic infraction, any other crime?

A. Not that I can recall, no.

[89] Q. Do you think you would recall --

A. I would think I would. That's why I said I got a speeding ticket once. I got one speeding ticket like in

1981.

Q. Have you ever taken any illicit drugs, controlled substances?

A. Yes.

Q. What controlled substances?

A. Marijuana.

Q. When was the last time you took marijuana?

MR. MAGNANINI: Objection to form.

THE WITNESS: Years ago. I don't recall how long.

BY MR. MARGOLIS:

Q. Any other illicit drugs?

A. Cocaine.

Q. How many occasions did you take cocaine?

MR. MAGNANINI: Objection.

What's the relevance of this, Craig?

MR. MARGOLIS: I think you can state an objection and I can pursue the testimony. I think it goes -- can go to credibility, but this is a [90] deposition, and I'm entitled to ask these questions.

MR. MAGNANINI: Objection to the series of questions.

THE WITNESS: Two or three times.

BY MR. MARGOLIS:

Q. When was the last time?

A. 1995 or '96, whenever that period of time that I got divorced.

Q. Any others?

A. No.

Q. What about methamphetamine or speed or amphetamines?

A. Yeah, I tried that a couple times, too.

Q. Do you know when that was?

A. In 1995 or '6.

Q. Any other time since that time?

A. No.

Q. You've testified about in the past having had an assault conviction related to alcohol, DUI related to alcohol. Have you ever received any treatment relating to alcohol abuse?

[91] A. Yes.

Q. Can you tell us about that, please.

A. Yeah. In 1995 or '96, whenever that was, I attended the court-ordered -- it was like 40 hours, I believe, of alcohol -- the standard court sentence, whatever they call that. I attended that.

And then I presently attend AA meetings, and I presently see a therapist.

MR. MAGNANINI: On that, I'll instruct you not to go into any details, Mr. Carter.

MR. MARGOLIS: And I wouldn't ask other than you're currently under the care of a mental health professional.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. Are you an alcoholic?

MR. MAGNANINI: Objection to form.

THE WITNESS: I don't believe so.

BY MR. MARGOLIS:

Q. Do you consume alcohol?

[92] A. No -- not to -- occasionally, I'll have a beer.

Q. How often?

A. Rarely. Once every two weeks maybe.

Q. Is that approximately how often you consume alcohol, then?

A. Yes.

MR. MARGOLIS: We have five minutes left on the tape, and I'm going to get into an area so maybe this as good a time as any to break.

MR. MAGNANINI: It is probably.

VIDEO OPERATOR: Going off the record at 11:45. This ends the first tape of the deposition of Benjamin Carter.

(Recess.)

* * *

(Whereupon, at 11:45 p.m., the deposition was recessed, to be reconvened at 12:30 p.m. this same day.)

[93] AFTERNOON SESSION (11:45 p.m.)

Whereupon,

BENJAMIN C. CARTER resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

VIDEO OPERATOR: This is the beginning of tape 2 in the deposition of Benjamin Carter going on the record at 12:39.

MR. MARGOLIS: Mr. Carter, we're going to start

with a housekeeping matter that we neglected to begin with earlier in the day, which is that the parties have agreed that today's deposition should be subject to the confidentiality provisions of the protective order that's entered in this case.

Do you agree with that, Mr. Holmes?

MR. HOLMES: Correct. That's agreed.

MR. MARGOLIS: That was that.

EXAMINATION (Continued)

BY MR. MARGOLIS:

Q. Mr. Carter, have you ever declared bankruptcy?

[94] A. Yes.

Q. When was that?

A. I believe in 1981 --'82.

Q. Is that personal bankruptcy?

A. Yes.

Q. Were your debts discharged?

A. Yes.

Q. Have you ever been sued in litigation?

A. Yes, I think once.

Q. I'm going to ask you about some matters, and please let me know what you know about these. Are you familiar with a case Knight Adjustment Bureau versus Ben Carter filed on December 11, 1995 in Iron County District Court in Utah?

A. I don't recall that.

Q. Did you have a debt matter with Knight Adjustment Bureau?

A. I don't recall it.

Q. Are you familiar with a case Office of Recovery Services versus Benjamin Chase Carter filed March 11, 1997 in Iron County District Court in Utah?

[95] A. Yes.

Q. Can you tell me about that, please.

A. To my knowledge, I think that was for child support arrears.

Q. Are you currently paying child support?

A. No.

Q. Do you have any child support obligations currently?

MR. HOLMES: Objection as to relevance.

BY MR. MARGOLIS:

Q. You can answer the question.

A. No.

Q. Are you familiar with -- how was that Office of Recovery Services matter resolved?

A. I don't know specifically about the time that you mentioned. Ultimately, it was discharged with me not owing any additional child support.

Q. Do you know when that was?

A. I believe it may have been 2001. It was in the early part -- 2001 or 2002.

Q. Why was it discharged?

A. Because the mother had abandoned my [96] children, and so they eliminated the child support.

Q. What's her name?

A. Marguerite Matthews now, I believe.

Q. Ask you about another matter. Department of Work Force Services versus Ben C. Carter filed October 23, 1997 in Iron County District Court in Utah styled as a Work Force Service lien matter. Are you familiar with that, sir?

A. No.

Q. Do you recall any liens being levied against you for work that was done?

A. No.

Q. So that doesn't ring a bell for you at all, that matter?

A. It doesn't.

Q. The next one is a Doctors and Merchants Credit versus Benjamin Carter filed on May 1, 2002 in Iron County District Court in Utah, again, a debt collection matter with a judgment on May 31, 2002. Are you familiar with that?

A. I'm familiar with the name Doctors and Merchants.

[97] Q. How are you familiar with that?

A. Probably because of that, but I don't know what the bill was, what it was for.

Q. Were you delinquent on bills in 2002?

MR. HOLMES: Objection; vague.

BY MR. MARGOLIS:

Q. Did you understand my question?

A. I did understand, and I don't recall. I'm sure I was behind on some. I don't know what they were in particular.

Q. Do you recall any -- strike that.

Do you recall any debt collection actions being brought against you because you were behind on your debts?

A. I think I do. The Doctors and Merchants. As I'm trying to remember, I think it may have been for a phone bill or something like that. It wasn't any foreclosure or bank loans or anything like that, no.

Q. The personal bankruptcy you were discussing earlier, do you recall what the total [98] amount of your debt was that was discharged in bankruptcy?

A. I don't specifically, other than I don't believe it was over 20,000. It was for a mobile home. That was my only debt and my only asset.

Q. Was that your residence at the time?

A. Yes.

Q. The next matter I want to ask you about is RC Willey versus Benjamin Carter filed on March 15, 2005 in Davis County District Court. It appears again to be a debt collection matter with a judgment on April 26, 2005. Are you familiar with that case?

A. No.

Q. Are you familiar with an RC Willey?

A. Never had an account with an RC Willey.

MR. HOLMES: Craig, is there an exhibit pending?

MR. MARGOLIS: No.

MR. HOLMES: You're referring to the next one. I wasn't sure if you had an exhibit to introduce.

MR. MARGOLIS: I don't.

[99] BY MR. MARGOLIS:

Q. The next matter I want to ask you about is

Outsource Receivables versus Ben Carter, a matter that was filed on February 16, 2006 in Davis County District Court, again, a debt collection matter that appears to have been satisfied on November 20, 2006.

A. Wow.

Q. Are you familiar with that?

A. Not at all.

Q. You were in Utah in 2006; isn't that correct?

A. Correct.

Q. You don't recall an Outsource Receivables to which you owed a debt?

A. No.

Q. Are you familiar with another matter Express Recovery Services versus Ben Carter filed on May 29, 2007 in Davis County District Court, a debt collection matter in Utah with a judgment on June 19, 2007?

A. Not whatsoever.

Q. Are you familiar with Express Recovery [100] Services?

A. No.

Q. You were living in Utah in 2007; is that correct?

A. That I don't know. 2005 -- I don't know that I was. I lived in Canada for a while after I got back. I don't know.

Q. Are you familiar with a matter Brittany A. Carter versus Ben Carter filed on August 17, 2009 in Davis County District Court, a tax lien that was closed on August 17, 2009?

A. No.

Q. Who's Brittany A. Carter?

A. I don't know.

Q. You're not familiar with that name?

A. No.

Q. Are you familiar with a Cred Management Service versus Air and Water Technologies, et al. filed on October 25, 1993 in Gunnison County Court in Colorado? Benjamin C. Carter was also cited as a defendant and that matter was closed on October 20, 1994.

[101] A. I don't remember that.

Q. Do you recall a Cred Management Service?

A. No.

Q. Air and Water Technologies was your company, though; correct?

A. Correct.

Q. Did Air and Water Technologies have debts owed it was unable to pay?

A. No. We had occasional times when money was tight, but I believe we paid all of our bills.

Q. You don't recall any debt collection matters associated with Air and Water Technologies?

A. I don't specifically remember that, no.

Q. Do you generally recall any debt collection matters related to Air and Water Technologies?

A. I vaguely recall somebody getting a judgment and they were able to garnish my business account, but other than that, I can't remember who it was or what it was for, so that's probably what that is in regards to.

Q. Do you know what the amount for which [102] there was a garnishment?

A. For some reason, like $900 sticks in my head, but I don't recall. It wouldn't have been more than a thousand dollars, I don't believe.

Q. Do you know whether that debt was discharged?

A. I don't.

Q. Is that the only instance you can recall of a garnishment either one of your businesses or against you personally?

A. Yes.

Q. Do you recall a matter State of Colorado versus Benjamin Carter filed on April 13, 1999 in Gunnison District Court, a restraint warrant, a judgment rendered on April 13, 1999 in the amount of $1347.96?

A. I don't remember that, no.

Q. Aside from your personal bankruptcy, have you had from -- from the time from your personal bankruptcy until the time you worked for KBR, did you have difficulty paying your debts?

MR. HOLMES: Objection; vague.

[103] BY MR. MARGOLIS:

Q. Do you understand my question?

A. I did occasionally, yes.

Q. From the time you began working at KBR until the present, have you had difficulty paying your debts?

A. I don't believe so.

Q. You're currently receiving partial disability

payments relating to the time you spent in Iraq; is that correct?

MR. HOLMES: Objection; relevance.

BY MR. MARGOLIS:

Q. You can answer the question.

A. Correct.

Q. Do you have any other income aside from those payments?

A. No.

Q. From the time you left KBR to the present, have you had any other income aside from the payments you've received relating to your Defense Base Act compensation from the time you spent in Iraq?

[104] MR. HOLMES: Objection; assumes facts not in evidence.

THE WITNESS: I've been supported, but I haven't had another job. I haven't worked. I haven't been able to. I had to go live with my family for a while, so that's what I mean by that.

BY MR. MARGOLIS:

Q. In terms of assuming facts not in evidence, is there any dispute that you did, in fact, receive compensation pursuant to a Defense Base Act claim you filed upon your return from Iraq?

MR. HOLMES: Objection; vague as to dispute.

THE WITNESS: I don't deny it.

BY MR. MARGOLIS:

Q. Did you make a DBA claim, sir?

A. Yes.

Q. Did you receive compensation for that DBA

claim?

A. Yes.

Q. You were diagnosed with posttraumatic stress disorder from the time you spent in Iraq; is [105] that correct?

A. Correct.

MR. HOLMES: Objection. I'm going to instruct the witness not to answer any further questions that go to medical privilege.

MR. MARGOLIS: It's not a medical privilege. I'm asking if he received a DBA claim.

What's the privilege basis, sir?

MR. HOLMES: Further questions that go further to the nature of any disability as to medical diagnosis, advice rendered by a medical professional, that's the instruction.

MR. MARGOLIS: I'm not asking about advice from a medical professional.

BY MR. MARGOLIS:

Q. Did you receive a Defense Base Act award based on a diagnosis of posttraumatic stress disorder?

A. Yes.

Q. You continue to receive payments relating to that Defense Base Act award; correct?

A. Yes.

[106] Q. Aside from that, have you received any other income -- aside from the support you mentioned about living with your relatives, et cetera?

A. No.

Q. What's the amount of your Defense Base Act

payments currently?

MR. HOLMES: Objection; relevance.

THE WITNESS: Every two weeks -- twice monthly $1306.94.

BY MR. MARGOLIS:

Q. Is that the total each month or is that--

A. The total of 2600 and the change.

Q. Do you know a person named Sandra Ipson?

A. Yes.

Q. Who is she?

A. She was the girlfriend that I moved to live with in Denver, Colorado who later became my wife who I operated the log furniture business with.

Q. You're not currently married to Ms. Ipson?

A. No.

Q. Let me turn to your application for employment with KBR. Why did you seek a job at KBR?

[107] A. To get away from Sandra Ipson and I was looking forward to becoming an employee again for a big company. I had never heard of KBR before I applied, but I had heard of Halliburton, and so I realized I was going to be getting divorced. And I thought this would be a great opportunity for me to spend the next 20 years going to work for Halliburton. That was my initial plans.

Q. So from the inception, you intended to have a 20-year career with Halliburton and KBR?

A. I did.

Q. What did you anticipate you were going to be doing with Halliburton and KBR?

A. I thought I would eventually, after I spent a year working for them in Iraq, that I would be able to go to their other jobs around the world that weren't necessarily in a war zone.

Q. Why did you think that?

A. Because they had other job postings for that. They had job postings for ROWPU in Afghanistan and I can't recall the other countries, but I saw that they had job postings for ROWPU [108] supervisors, foremen, so that was my intent, was to stay working for them.

Q. You applied for a job in Iraq; is that correct?

A. I believe I initially applied for one in Afghanistan and accepted Iraq, if my memory serves me right.

Q. Do you recall the process by which you applied?

A. Yes.

Q. Did you apply initially through a Web site?

A. Yes.

Q. Was this something that was on screen and you would enter fields of data through the Web site as you were submitting your application, do you recall?

A. I don't recall. Initially right now, I'm thinking no because I recall I e-mailed a resume, so I don't recall.

MR. MARGOLIS: Let me put a document in front of that you may refresh your recollection. If [109] we could mark this as Defense Exhibit 43, please.

(Defendant's Exhibit 43 identified.)

MR. HOLMES: If you could allow him a minute to look at the document, Craig, thanks.

BY MR. MARGOLIS:

Q. Do you recognize that document, Mr. Carter?

A. I don't specifically recognize this first page. I don't remember inputting this information and answering these questions. I recognize the rest of it, my resume.

Q. You see at the bottom there there's a link to webrecruiter.com?

A. I see that.

Q. Do you not recall entering this data into this Web site, this application?

A. I really don't recall that.

Q. Does the information on there appear to correspond with your personal information?

A. It does, yes.

Q. Those are your phone numbers, for example?

A. Yes.

[110] Q. And the address -- the street address is blacked out on this copy. You were living in Pangulch, Utah, at the time, is that correct, at the time you submitted the application?

A. Yes, Panguich.

Q. And ben@cartercreation.com was your e-mail at the time; is that correct?

A. Yes.

Q. Do you see at the bottom where it says "Source Detail" with a colon on the left-hand side and you see there's an entry "I don't understand this question"?

A. Yes, I see that.

Q. Do you recall whether or not that was you who entered that information?

A. I don't recall. It makes sense that I would say that. So I may have absolutely done that.

Q. You see it says "Willing to work outside of your current country" was the question and there's an entry "YES." Do you see that?

A. Yes, I do.

Q. Underneath, do you see where it specifies [111] the area?

A. I do.

Q. Inputted there is "Iraq"?

A. Yes.

Q. Does that refresh your recollection as to whether or not you had actually sought a posting in Iraq when you initially applied with KBR?

A. For some reason, I thought I initially tried for Afghanistan, so no, it doesn't. But if I did input this, that's what it says. Maybe my memory isn't serving me correctly. I may have applied for a ROWPU foreman job in Afghanistan and I'm confused. I'm not denying that I said yes.

Q. You actually have a recollection of applying for a ROWPU foreman job in Afghanistan?

A. Not specifically in Afghanistan, but I recall speaking with Beth Laxton, a recruiter, that I felt I was more qualified than just a ROWPU operator and would like a ROWPU foreman job.

Q. Looking at the attachment here -- when I say attachment, I should be more precise -- starting on

the third page of this exhibit, there's a [112] three-page document. It appears to be essentially a CV. Is that something that you prepared?

A. Yes.

Q. You recognize it, then?

A. I do.

Q. And that document goes through your background, correct, and your qualifications?

A. Correct.

Q. We discussed some of that earlier, Mr. Carter, but in terms of experience, actually working on reverse osmosis water purification, how many years' experience did you have in that particular area prior to working for KBR?

MR. HOLMES: Objection; compound.

THE WITNESS: I have a hard time to answer that, other than -- because I had jobs in between. For instance, when I lived in Colorado where I was essentially full-time every day working on reverse osmosis to Echo Water. I worked for a plumbing company before that.

I don't know that I could really quantify.

BY MR. MARGOLIS:

[113] Q. Can you give me an estimate?

A. From 1989, I think--was it '89?

Whenever I started working for Culligan all the way up to Echo Water when I worked for them. That's been my primary focus in my adult life, has been water purification.

Even when I wasn't working on it, I was still receiving trade journals and keeping up to date on it.

MR. MARGOLIS: Just to keep this moving along, I'm going to mark as a group Defense Exhibit 44. I don't know that I'll be asking you questions about every piece of that. You can see on Defense Exhibit 44 portions of are blacked out in terms of identifying personal information.

THE WITNESS: I see that.

(Defendant's Exhibit 44 identified.)

BY MR. MARGOLIS:

Q. Do you recognize this first document entitled "Emergency Data Profile"?

A. I do.

Q. That's your handwriting, sir?

[114] A. It is.

Q. Is that your signature at the bottom?

A. It is, yes.

Q. This is a document that is dated 3 January 2005. Do you see that?

A. Yes.

Q. Is this emergency data profile a document you filled out at the time you applied for employment with KBR or perhaps at the time you accepted employment would be the better time frame?

A. I think I did this when I was in Houston, so yes.

Q. Turning the next page, please -- I should ask, when you say "when I was in Houston," is that the orientation you were testifying about earlier before your employment with KBR to Iraq?

A. Correct.

Q. You see a document entitled "BROWN & ROOT SERVICES CORPORATION BUSINESS CONDUCT STANDARDS AND RULES." Do you see that?

A. I see.

Q. You see there's an employment [115] acknowledgment at the bottom?

A. Yes.

Q. Is that your signature that appears at the bottom of the document?

A. Yes.

Q. It's also dated 3 January 2005?

A. Yes.

Q. This acknowledgment states that the signer has read the document and acknowledges and understands "Brown & Root Services Corporation's commitment to the Business Conduct Standards and agree to these rules as they apply to my employment."

Had you read these rules before you signed this document?

A. Yes.

Q. And you agreed to follow those rules during your employment for KBR in Iraq; is that correct?

A. Yes.

Q. And you understand that one of those requirements midway down the page, and tell me if [116] I'm reading this correctly, states "Factual record-keeping-Employees will keep accurate books, records and accounts and will help maintain an adequate system of initial controls as required by law and company poli-

cy." Do you see that?

A. I do.

Q. Did you understand that when you signed this?

A. I did.

Q. Did you understand you had an obligation to keep accurate books and records at the time you were working for KBR?

A. Yes.

Q. Turn to the next page, please. The next page of this document is an acknowledgment form that includes several statements that requires the signer to initial each of those. Are those your initials on that page, sir?

A. Yes.

Q. Is that your signature at the bottom of the page?

[117] A. Yes.

Q. Again, dated 3 January 2005; is that right?

A. That is right.

Q. Have you certified here that you received and read a copy of the Halliburton Company Code of Conduct Business Summary?

A. Yes.

Q. You agreed you would follow the policies there?

A. Yes.

Q. You also see in the fourth provision there that you acknowledge that "KBR employees are not authorized to post any information on the internet that pertains to the mission of Halliburton/KBR or the military operations." Do you see that?

A. Yes.

Q. Did you understand that you were bound by these rules as a condition of your employment?

A. Pardon?

Q. Did you understand that you were bound by these requirements that we've just discussed as a condition of your employment?

[118] MR. HOLMES: Objection. The document speaks for itself.

BY MR. MARGOLIS:

Q. You can answer.

A. I think I understood it to the best of my ability at the time, yes.

Q. You knew you could be fired for not following these rules; right?

A. Oh, sure, yes.

Q. You also understand you could be subject to legal action for not following the rules; right?

A. Yes.

Q. Do you see the next page of that document, sir?

A. Yes.

Q. To assist with some of these from time to time I'll refer to what are called Bates numbers, which are the numbers on the bottom right-hand corner of some of these documents.

A. Okay.

Q. That's a "NEW HIRE/REHIRE" form. Do you see that, sir?

[119] A. I do.

Q. Is that your signature on the bottom of the page?

A. Yes.

Q. You see there's a secrecy agreement that you've signed in this document?

A. Yes.

MR. HOLMES: Objection. Craig, I think you're characterizing the document.

BY MR. MARGOLIS:

Q. Does it say "EMPLOYEE'S SECRECY AGREEMENT," Mr. Carter? Am I reading that correctly?

A. Yes, it does.

Q. Did you sign it at the bottom?

A. Yes, I did.

Q. Does it say -- and tell me if I'm reading it incorrectly -- "I, the undersigned employee of the Company" -- let me stop there. You're the person who signed as an employee here; correct?

A. Correct, yes.

Q. "I, the undersigned employee of the [120] Company, or applicant for employment, in consideration of my employment by it for such work as may be assigned me this or any other job and the possible disclosure to me of certain confidential information of the Company and its Customers have agreed and do hereby agree as follows."

Did I read all of that correctly?

A. You did.

Q. You see the requirements underneath that,

sir?

A. Well, I haven't read them.

Q. You did read them before you signed them; right?

A. Yes.

Q. Feel free, if you want to take your glasses out and take a look.

MR. HOLMES: Take a look.

BY MR. MARGOLIS:

Q. Under that first provision, did you agree you would not disclose to anyone other than in the course of the employment any trade secrets or confidential information you learned during [121] employment?

MR. HOLMES: Which provision is the first provision?

MR. MARGOLIS: The one that says 1.

MR. HOLMES: Thank you, Craig.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. And you see that number 2 is that "Such 'trade secrets or confidential information' shall include everything told to me in confidence as a trade secret and, also, all photographs, maps, drawings, reports, specifications, operating data, procurement or marketing information, cost data and other information relating to the details of the work and operations and installations affected."

Did I read that correctly?

A. You did, yes.

Q. Did you understand you were bound by this

agreement not to disclose any of the information we've just discussed?

A. Yes.

[122] Q. You also understand in the paragraph numbered 4 that the agreement could be enforced by legal action?

A. Yes.

Q. On the next page, sir, 7658 is the Bates number, you see there's a document with a KBR initials in the upper left-hand corner. There are two sections, "Reporting of Injuries/Illnesses" and Accident/Near-Miss Reporting." Do you see that?

A. I do.

Q. Is that your signature on the bottom of the page?

A. Yes.

Q. With a date of January 17, 2005. Do you see that?

A. I do.

Q. Is that your name in print that appears in the blankout that starts with the sentence "upon reading this document" and goes on from there?

A. Yes, it is.

Q. Did you read the document before you signed it?

[123] A. Yes.

Q. On "Accident/Near-Miss Reporting," am I correct in that second paragraph that that paragraph imposed an obligation on you to report immediately accidents or near misses to HSE?

A. I see that, yes.

Q. Do you understand it?

A. I understand it now. I didn't then.

Q. At the time you filled out this document, were you working with -- you signed this document after you received training from KBR; is that correct?

A. During the time I received training, not after, I believe. Maybe it was after.

Q. Didn't you have an opportunity to ask questions if you had any questions?

A. I believe so. My only point I'm making is I didn't think I knew what HSE was.

Q. By the time you arrived in Iraq, did you know what HSE was?

A. Yes.

Q. Did you know an individual named Harold [124] Orr?

A. Yes.

Q. Also known as Mo?

A. Affectionately, yes.

Q. He was the HSE coordinator for Ar Ramadi during the time you were there?

A. That's right.

Q. HSE stands for Health, Safety and Environment. Is that your understanding?

A. Yes.

Q. Since we have the document in front of us now, with the Bates number 7665 in the bottom right-hand corner. Do you see that?

A. I do. Is it the "DEMOBILIZATION CLEARANCE FORM"?

Q. Exactly right.

A. Yes.

Q. Is this a document that you prepared at the time that you left KBR's employment?

MR. HOLMES: If you need time to look at the document, Ben, go ahead.

THE WITNESS: Yes, I do. It appears to [125] be, yes. I don't recall it.

BY MR. MARGOLIS:

Q. Is that your handwriting at the top?

A. Yes, it is.

Q. Is that your signature at the bottom?

A. Yes.

Q. And the date that you left employment from KBR is March 29, 2005; is that correct?

A. I don't think so.

Q. When is it that you believe you left KBR?

A. It was in April. We're only talking about a couple days here, but I don't think-- I don't believe that's the day I left Iraq is what I'm getting at specifically.

Q. We'll get back to that in a moment.

Do you recognize your handwriting elsewhere on this page besides your signature at the bottom and the print at the top?

A. I do.

Q. Those are your initials on the right-hand side; is that correct?

A. I don't see that.

[126] Q. So are these other persons' initials, on the right hand where it says "INITIAL & SAP," are those other persons' initials?

A. They don't look like mine.

Q. Was your badge number at the time you were employed by KBR 331037?

A. Yes.

Q. I'm going to direct your attention-- they're numbered items. Do you see how they're numbered items in terms of the various --

A. Departments.

Q. Do you recall as part of your demobilization process going through a series of departments and having meetings and having this form checked off?

A. I do.

Q. Do you recall one of them therefore, and it's indicated here on this list, is "CLEARED THRU SAFETY"? Do you recall that?

A. Yes.

Q. Do you see there's a mark with a check mark "No" under "Unresolved injury/illness"?

[127] A. I see that, yes.

Q. When you signed this form, you believed it was accurate; correct?

A. Yes.

Q. You wouldn't have signed it otherwise; right?

A. Right.

Q. And in terms of a date or maybe trying to refresh your recollection as in terms of when you de-

parted we can mark this next exhibit as Number 45, Defense 45.

(Defendant's Exhibit 45 identified.)

BY MR. MARGOLIS:

Q. Placing before you what appears to be an e-mail dated March 27, 2005. Do you see that?

A. I do.

Q. Do you recognize the e-mail?

A. I do.

Q. In this e-mail you were informing another KBR employee by the name of Terrence Copling that you "had enough of this place"; is that correct?

A. That's correct.

[128] Q. And "this place" is Ar Ramadi; correct?

MR. HOLMES: Objection.

BY MR. MARGOLIS:

Q. Did you understand my question?

A. Yes, but that's not correct.

Q. Tell me what you meant by this place.

A. It was Halliburton employment.

Q. Is this the time when you decided you were going to be separating from KBR?

A. Yes.

Q. And that's on March 27; correct?

A. That's what the date of this says. I don't know if that was the date that I decided that I was leaving. I want to be as accurate as I can, you know. So I don't know where the time frame of me sending this to Terrence and end with me saying I'm leaving, but

within a couple days, sure.

Q. I don't want to belabor the point, but for Exhibit 45, you see there's a date there of March 27?

A. Right, I do.

Q. You say there "I will be taking care of [129] the necessary paperwork tomorrow"; correct?

A. Yes.

Q. And then on this demobilization clearance form we've been looking at, which is part of Exhibit 44, you see an actual date of March 29?

A. I do, yeah.

Q. Does that refresh your recollection at the time that you departed -- you left KBR's employment and demobilized on March 29 and not in April?

A. No. I'll clarify for you.

Q. Sure.

A. I did this while I was in Ar Ramadi still through the various departments, and then I had to still wait several days before I got a flight to Al Asad and I think a day until Baghdad. That's why I'm being specific about the date.

Q. That's your recollection as to when you left?

A. Yes.

Q. Let me ask you about a couple different e-mail addresses just to make sure we know they're correctly associated with you.

[130] A. Okay.

Q. Your e-mail address for the time you were working at Halliburton was ben.carter@halliburton.com; is that correct?

A. Yes.

Q. Is one of your personal e-mail addresses bencarter63@hotmail.com?

A. Yes.

Q. Is another personal e-mail address ben@cartercreation.com?

A. Yes. I don't think I used it after I went to work at KBR.

Q. I said personal. Was that an e-mail associated with your furniture business?

A. Yes.

Q. Any other personal e-mail addresses that you used during the time frame you were working at KBR?

A. I don't believe so. Not that I can recall, no.

Q. For e-mails that been produced to us in the course of litigation by your counsel that have [131] one of these e-mails addresses either in the sending line or cc line or the receipt line -- let me break that down.

If one of these e-mail addresses appear in the sending line, do you have any reason to believe you didn't send the e-mail?

A. No, I don't.

Q. If it's an e-mail that applied where it was in the receive line of the e-mail, one of these e-mail addresses, any reason to believe you didn't receive the e-mail?

MR. MAGNANINI: Objection to form. It's a hypothetical.

THE WITNESS: It's possible that I didn't receive

it, and I'll clarify, because sometimes e-mails that I received come to my junk mail and I delete them without ever having read them, so I don't think that really qualifies as me receiving it.

Sometimes you make a mistake and delete one. I know that's happened. I had a girlfriend that got the password to my bencarter63@hotmail [132] account, so I don't know what she could have done with some of them.

BY MR. MARGOLIS:

Q. I'm asking about e-mails produced by your lawyers in this litigation.

A. Yeah.

Q. Any reason to believe you didn't receive where one of these e-mail addresses appears in the receive line?

A. No, no reason that I can think of.

MR. MAGNANINI: Craig, can we take a quick two-minute break?

MR. MARGOLIS: Sure.

VIDEO OPERATOR: Going off the record at 1:23.

(Discussion off the record.)

VIDEO OPERATOR: We're back on the record at 1:29.

BY MR. MARGOLIS:

Q. At the time that you began working for KBR, Mr. Carter, do you recall signing an employment agreement?

[133] A. I do.

MR. MARGOLIS: We've marked Defense Exhibit

46 for identification.

(Defendant's Exhibit 46 identified.)

BY MR. MARGOLIS:

Q. Do you recognize this to be the employment agreement that you signed?

A. Yes.

Q. If you could turn to the 12th page of the document, and it's actually the third page from the back.

MR. HOLMES: Can we get the Bates number for the record.

MR. MARGOLIS: 7701.

THE WITNESS: I'm there.

BY MR. MARGOLIS:

Q. Are those your initials, sir?

A. Yes.

Q. On the next page on the left-hand side, are those also your initials?

A. Yes.

Q. Is that a print of your name in your hand [134] on the right-hand column under the paragraph numbered 34 titled "Understanding of Terms"?

A. Yes, it is.

Q. You read this agreement before you signed it?

A. Yes.

Q. As you see above that, you certified that you fully understood and agreed to follow the terms and conditions of the agreement when you signed it?

A. Correct.

Q. On the next page, you'll see there's a "Service

Employees International, Inc." Do you see that?

A. I do.

Q. Is that your handwriting that appears on this document?

A. It is.

Q. Did you sign that document?

A. Yes.

Q. Dated January 6, 2005; correct?

A. Correct.

Q. Service Employees International, Inc. was [135] the payroll company-- not payroll company. That was the company that was your actual employer during the time you were in Iraq; is that correct?

MR. MAGNANINI: Objection to form.

THE WITNESS: I didn't know that at the time.

BY MR. MARGOLIS:

Q. Do you know that now?

A. I know that now.

Q. When you signed this, you see that it appears "Employer: Service Employees International, Inc." on the data sheet?

A. I see that. I didn't know who I was working for.

Q. But you nonetheless signed the document?

A. I did sign it, yes.

Q. You see on the first page of the employment agreement in the first paragraph that it's an employment agreement between Service Employees International, Inc. and you. Do you see that?

A. I do see that.

[136] Q. You read this at the time before you signed the agreement; right?

A. Yes.

Q. You understood, sir, that this was a 12-month agreement; correct?

A. I did understand that to be 12 months.

Q. In fact, there was no minimum guaranteed duration for your employment, that it was an anticipated employment of 12 months; is that correct?

A. That was my understanding, yes.

Q. And you understand the compensation you were to receive was based on your individual job classification; right?

A. Yes.

Q. And your job classification was a ROWPU operator; correct?

A. Correct.

Q. In fact, on the data sheet that's the last page of this employment agreement includes in paragraph 5 that job classification for a ROWPU operator; right?

[137] A. Right.

Q. You understood, then, you were not to receive pay that was different from the pay for a ROWPU operator unless there was a change in your job classification; is that correct?

A. Yes.

Q. In fact, the way you'd be notified of a change in your job classification is by receiving a personnel action notice, or a PAN; is that correct?

A. I'm not aware of that. I don't know what the

policy was that would inform me of a different job title.

Q. If you could turn to the second page of your agreement with the Bates number 7691, in the upper right-hand corner, do you see there it states "In-Country Project Manager and the Project General Manager must approve any job classification or rate adjustment(s) in writing, and any changes in job classification or salary are only effective on the date indicated of the formal Personnel Action Notice (PAN)."

A. I see that.

[138] Q. And you read that at the time you signed your agreement; right?

A. I'm sure I did.

Q. There's a business salary that appears of $2583 per month; is that correct?

A. Yes.

Q. Just below that it indicates in your agreement that your base monthly salary is based on a minimum 40-hour workweek. Do you see that?

A. Yes, I do.

Q. Underneath that, the following sentence "There is no guarantee of more than 40 hours of work per week." Do you see that?

A. Yes.

Q. Did you understand at the time you signed your agreement you were guaranteed no more than 40 hours of work per week?

A. Correct.

MR. MAGNANINI: Objection to form.

THE WITNESS: I understand there was no guar-

antee of more than 40 hours per week.

[139] BY MR. MARGOLIS:

Q. And that your base salary was based on that 40 hours of work per week minimum; correct?

A. Correct.

Q. Are you familiar with the term "uplift"?

A. Yes.

Q. Uplifts are various increases in your pay that you receive based on factors such as where you were working; correct?

A. That's what I understand, yes.

Q. And whether it was a hazardous condition where you were working; is that correct?

A. Yes.

Q. So Iraq was a -- you'll see where there's actually a description of some of the various uplifts that are available in the agreement. Do you see those?

A. I don't.

Q. In the next sentence after "guarantee of more than 40 hours of work per week," "Foreign Service Bonus." Is that an uplift?

A. I imagine it would qualify as an uplift, [140] yes.

Q. "Work Area Differential," is that an uplift?

A. I don't know.

Q. "Hazard Pay," you recall that's an uplift; right?

A. Yes.

Q. You see there that those uplifts, if appropriate, would apply only to the first 40 hours; correct?

A. Yes.

Q. For any hours by your employment agreement you would not receive those uplifts for any hours worked in excess of 40 hours a week; correct?

A. I don't know.

Q. Do you know what your employment agreement says, sir?

A. Apparently it says that. I didn't know how they came up with me earning $84,000 a year other than working 84 hours a week. It was hard to understand.

Q. Your employment agreement doesn't say [141] that, does it, any guarantee of a $84,000 a salary?

A. Beth Laxton told me that.

Q. I'm asking you, sir, what your employment agreement says.

A. I guess it doesn't.

Q. Is what Beth Laxton told you, is it in writing anywhere, sir, to your knowledge?

A. I would think-- I know she told me that over the phone. I don't know if I got an e-mail. I wouldn't have taken the job if it only paid $2600 a month.

Q. Back to your employment agreement, please, do you see there's a calculation here on an hourly rate, and the formula base salary per month times 12 months divided by 2080 equals straight time rate per hour. Do you see that, sir?

A. Yes.

Q. That's essentially a calculation of what the rate is on an hourly basis; correct?

A. For 40 hours, yes.

Q. That essentially determines what you'll be paid for each additional hour that you work above 40 [142] hours a week; correct?

A. I don't know.

Q. If you can follow along with me, above that formula, all hours worked over 40 hours per week will be paid at the straight time rate. Do you see that?

A. Yes.

Q. If you go down--

MR. MAGNANINI: Where is that, Craig?

MR. MARGOLIS: It's in the sentence in the paragraph just above the formula, Bob, right above the discussion --

MR. MAGNANINI: Yeah, okay.

BY MR. MARGOLIS:

Q. Just beneath that there's a formula that we've just discussed.

A. I see that.

Q. Base salary per month times 12 months divided by 2080 hours equals straight time rate per hour; correct?

A. Correct.

Q. Isn't it true, sir, per your employment [143] agreement, you would receive a straight time hourly rate based on your base salary on 12 months divided by 2080 hours for every hour worked above 40 hours in a week?

MR. MAGNANINI: Objection to form. You can answer it.

THE WITNESS: I suppose so. I'm not denying that it says that here, and I'm not trying to be argumentative. I just keep going back that's not what they concentrated on in our training. They concentrated on telling us you're going to make $84,000 if you work 12 months and if you leave the country-- if you don't go back to the United States for more than 30 days, so I didn't spend much time paying attention to this because I was told I was going to make $84,000 a year.

BY MR. MARGOLIS:

Q. This agreement is KBR's -- those were KBR's obligations to you in terms of what you're going to be paid; isn't that right, sir?

A. I believe so, yes.

Q. You understood this was a legal document [144] at the time you signed it; right?

A. Yes.

Q. As we went through, you read it and made sure you understood it before you signed it; correct?

A. Yes.

Q. I'm going to ask you, please, to turn to page 8 of the document, which is the Bates number 7697 at the bottom of the right-hand corner.

A. Okay.

Q. Do you see there the paragraph "Standards of Conduct," paragraph 16?

A. I do.

Q. In this paragraph you've agreed to "observe the standards of conduct and other requirements of the Halliburton Code of Business Conduct in effect at your Date of Hire and as updated periodically"; is

that correct?

A. That's correct.

Q. Following that are several different parts of those standards of conduct; is that correct?

A. Yes.

[145] MR. MAGNANINI: Do you want to review the whole thing?

THE WITNESS: Yeah. I should review it.

I thought I worked for SCI and not Halliburton. It says Halliburton's code of business conduct.

Does it go on?

BY MR. MARGOLIS:

Q. The one I'm going to ask you about is on paragraph E on the next page on the left-hand side.

A. On the next page?

MR. MAGNANINI: Yes. It continues.

MR. MARGOLIS: On 7698.

THE WITNESS: Okay, I've read it.

BY MR. MARGOLIS:

Q. You see under "Fraud, Dishonesty, or Abuse of Employer Policies," it's one of the types of conduct that would violate the code of conduct is "falsification of time card." Do you see that?

A. Yes.

Q. That was also a condition of your employment; is that correct?

A. Yes.

[146] Q. And then in the paragraph below under "Misuse of Time" --

A. Let me read that real quick.

Q. Sure.

A. Okay.

Q. You see that other violations of the code of conduct would include "Neglect of duty; failure to perform work at an acceptable standard; interfering with the work of other employees; sleeping or deliberate acts of inattention on duty; failure to return to duty promptly at the end of specified or established break periods." Is that correct?

A. Yes.

Q. Those were all conditions of your employment agreement as well; correct?

A. Yes.

Q. Can you turn, please, to the page that's page 11 of the agreement that has the Bates number 7700 at the bottom right-hand corner. Specifically, I'm going to ask you, Mr. Carter, about paragraph number 22.

[147] A. Okay.

Q. You see at the beginning of that paragraph you're representing that you're technically or professionally qualified without further training essentially to do the jobs and duties consistent with your job classification; right?

A. Right.

Q. As you've already testified, you felt that you were qualified to be a ROWPU operator at the time you signed the agreement; correct?

A. Right.

Q. You make certain representations here in

terms of your licenses, certificates and credentials to do that work; correct?

A. Correct.

Q. That's a question I should have asked you at the time I was asking you questions about your background. Do you have any professional licenses or certifications?

A. I don't have any currently.

Q. You have in the past?

A. Yes.

[148] Q. Can you tell us about those, please.

A. Yes. A certified water operator's license. It's for operating small community water systems.

Q. What's the licensing authority that issues that?

A. I think it's the Department of Health in the state.

Q. Which state were you licensed?

A. Colorado.

Q. Do you recall when you got that license?

A. I really don't recall. It would have been in the Culligan days.

Q. Do you recall how long you held the license?

A. No, I don't recall.

Q. Why did the license expire?

A. I think just paid an annual fee. It was probably the last year that I had Air and Water Technologies company. The only way it benefited me was so that I could collect microbiological samples and take them to the state health lab and have them [149] tested.

And then I had Water Quality Association credentials as a water treatment specialist, but that's really kind of a trade group.

Q. Did you have any disciplinary proceedings associated with your license?

A. No.

Q. Going back to the "Qualifications, Reclassification" paragraph of your employment agreement, you see there in the middle of the paragraph that you have agreed "that you will accept work assignments at any location within the Area of Operations as may be assigned by Employer, at the hours and on such shifts as designated by Employer." Do you see that?

A. Yes.

Q. If you see below that, "In the event that Employer requires you to render services in a job classification other than that for which you were assigned/hired, you agree to perform such work and such classification to the best of your ability at the rate specified in this Agreement." Correct?

[150] A. Correct.

Q. For example, as we've discussed, if you're doing work as a carpenter, under this employment agreement, you've agreed to do such work but be paid as a ROWPU operator; correct?

MR. MAGNANINI: Objection to form, but you can answer.

THE WITNESS: I didn't understand it that way, but I knew that I was being paid as a ROWPU operator, and I understand that's what it says right here.

BY MR. MARGOLIS:

Q. Does a carpenter have a different job classifica-

tion than a ROWPU operator?

A. I think they did.

Q. Does a plumber have a different job classification than a ROWPU operator?

A. I thought they did. I could be wrong, but I thought they did.

Q. Regardless of what work you were doing, you were being paid as a ROWPU operator; right?

A. That's how it turned out, yes.

[151] Q. That's what you understand this agreement to say?

A. Right.

Q. On the left-hand column, if you could please look at the second paragraph up from the bottom, "You agree that unless you have prior written consent from Employer, you will not disclose or use at any time, either during or subsequent to your employment, any secret, proprietary or confidential information, whether patentable or not, of Employer or the Client, of which you become informed during employment, whether or not developed by you, except as required in your duties for the Employer or the Client."

Do you see that?

A. I do.

Q. You had a confidentiality obligation under this agreement; correct?

MR. MAGNANINI: Objection to form.

THE WITNESS: I believe so, yes.

BY MR. MARGOLIS:

Q. Last page of the agreement, please, 7702, [152] paragraph 30. Here again, you're certifying that you've acknowledged and agreed that you have been provided a copy of the Halliburton code of business conduct, that you're responsible for reading it and complying with it.

A. Correct.

Q. Is that correct?

A. Yes.

Q. And you understood that was a condition of your employment; right?

A. Yes.

Q. On the data sheet we looked at before, do you see here again, your job classification we discussed, and do you see under "Compensation," again, there's a base salary number. Do you see that?

A. Yes, I do.

Q. That's the same base salary that appeared earlier in your agreement; correct?

A. Correct.

Q. It states your payroll period is monthly; right?

[153] A. Yeah, it says that. I don't think it was monthly.

Q. You don't think you were paid once a month?

A. Maybe I was. I don't remember. I guess it was once a month.

Q. And you see the various differentials --excuse me, various uplifts we've talked about earlier and what their percentages were; right?

A. Right.

Q. Do you recall whether you received for the time you spent in Iraq all three of these uplifts on these 40 hours a week?

A. I don't recall.

Q. We've covered the employment agreement.

We talked about briefly previously that you've given your deposition before; correct?

A. Correct.

Q. That was in the context of the Defense Base Act claim that you previously testified about?

A. Yes.

Q. Do you recall in those depositions taking [154] the same oath that you're subject to here to testify truthfully to the best of your ability?

A. No, I don't, but I'm sure I did because it was a deposition.

(Discussion off the record.)

VIDEO OPERATOR: Back on the record at 1:55.

BY MR. MARGOLIS:

Q. Mr. Carter, just before we broke, you were saying that was a deposition -- you assume you were subject to the same oath you're subject to today?

A. Correct. Assume. I don't recall there being a court reporter, but I assume that I was sworn in, whatever you call it.

Q. Did you testify truthfully to the best of your ability?

A. I did.

Q. And you were represented by counsel in the DBA claim; right?

A. Yes.

Q. Is that Steven Birnbaum; is that right?

A. Yes.

[155] Q. Similarly, there was a hearing, administrative hearing on your DBA claim?

A. Yes.

Q. And you testified at that as well?

A. Yes.

Q. Similarly, did you testify truthfully to the best of your ability during that hearing?

A. I did.

Q. At the hearing you were also represented by counsel?

A. Yes.

Q. Same counsel, Mr. Birnbaum?

A. Yes.

Q. I do want to ask one question -- a small series of questions relating to the DBA and only this: I understand that you had concern at the time of your DBA proceeding with respect to threats -- let me scratch that -- concerns related to your DBA proceeding about Halliburton and whether Halliburton posed a threat to you; is that correct?

A. Yes.

Q. Do you continue to have those concerns?

[156] A. Yes, to a lesser degree, but yes.

Q. What concerns do you have today about whether Halliburton poses any threat to you?

A. They're a very powerful company politically

and otherwise. So I'm concerned that they may follow me, things like that. I'm not concerned they're going to kill me anymore.

Q. Have you ever had any reason to believe that somebody from Halliburton was in fact following you?

A. Yes.

Q. Can you tell us about that, please.

A. I had an individual follow me from the gym. I noticed his car, and it was driving in front of my house and parking down the street. This occurred over several days, and then I finally confronted him. I snuck up on him and caught him sitting in a rental car, brand-new car, dark windows, and he was on a laptop, and he didn't see me walk up behind him, and I knocked on the window and asked him what he was doing following me.

And he was caught off guard and he said [157] I'm not following you. And I said yes, you are. I took a picture of you in my driveway. He saw me standing there as I clicked the picture with my telephone and went on and on.

And I asked him who he's working for you, and he said I can't tell you. He said I'm working for a big international company, but I can't tell you the name. And I said well, you better tell me.

And he said well, I'd have to get authorization from my employer.

He continued to try to say that he wasn't really following me, and I said I saw you follow me from the gym, and you're obviously from out of town.

He said he lived in California somewhere.

And he said to me that he just got a temporary

membership at that gym and he was here for a week doing whatever it was he was doing. He was following me around.

Q. Did you call the police?

A. No. I called my lawyers.

Q. Obviously you shouldn't disclose --

MR. MAGNANINI: You shouldn't disclose any [158] of those conversations.

BY MR. MARGOLIS:

Q. Anybody from Halliburton or KBR ever threaten you?

A. Not that I can recall.

Q. Turning back again to your training that you received in Houston, do you recall receiving time sheet training in Houston?

A. I assume that we did, but I don't recall specifically. My memory serves me that I was given time sheet training in terms of how to actually fill them out, like, in Dubai, to write UAE. I do recall getting time sheet training in terms we have to keep it with us at all times, yes.

Q. Do you recall ever receiving a PowerPoint presentation about timekeeping?

A. I don't recall specifically. There was a lot of those.

Q. PowerPoint presentations?

A. Yes.

MR. MARGOLIS: Let me show you a document that's actually been previously marked, so I'd like [159] to use that same exhibit number here as Defense Exhibit 6.

BY MR. MARGOLIS:

Q. Do you recognize this PowerPoint?

A. I believe I do, yeah.

Q. Do you recall when you viewed this?

A. It must have been in Houston. I'll just conclude that that must have been where it was.

Q. You said you received some training as well on Al Asad, but do you recall seeing a PowerPoint on Al Asad?

A. No.

Q. You recognize it. You believe you would have received the training in Houston?

A. Right.

Q. I want to direct your attention, please, on the second page of the document, 19239 is the Bates number on the second slide on the bottom of the page. Do you see there "Each employee is responsible for his/her individual timesheet. On this project your timesheet is the only document used as billing support for your Labor charges. The [160] timesheet is your individual invoice, not only to KBR for payment of your salary but it is also the required support documentation for KBR's billings to the United States Government"?

A. Yes, I do.

Q. Is that the basis you're discussing for your earlier understanding in terms of how your time is charged to the government?

MR. MAGNANINI: Objection to form.

THE WITNESS: I'm sure it is, yes.

BY MR. MARGOLIS:

Q. But you understand based on your training that you, as an employee, were responsible for your time sheet; correct?

A. Correct.

MR. MAGNANINI: Objection to form.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. And that that time sheet, as it states here, was your invoice to KBR for the payment of your salary; is that correct?

MR. MAGNANINI: Objection to the form, but [161] you can answer it.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. Do you disagree with the training that you received at the time you became a KBR employee in Houston?

MR. MAGNANINI: Same objection, but you can answer.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. Do you see below that, second paragraph, "Do not take your signature on your timesheet lightly. Any case of fraud or similar irregularities WILL BE GROUNDS FOR DISMISSAL"?

Do you see that?

A. I do.

Q. Did you understand that at the time you received the training?

A. Yes.

Q. Turn to page 15 of the document, and it's with the Bates numbers 19252 at the bottom [162] right-hand corner. Do you see there's "Frequently Asked Questions" on the top slide?

A. I do.

Q. "How many work hours am I guaranteed per week and do uplifts apply to all my hours?" Do you see the answer there?

A. I do. I see that.

Q. That's a quote from the same part of the employment agreement that we've covered that states your guarantee is limited to 40 hours per week; correct?

MR. MAGNANINI: Objection to form. But you can answer.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. The uplifts are limited to the first 40 hours; correct?

A. Yes.

Q. Do you see the second question about when your time on the clock starts and when does it stop?

A. Yes, I see the question.

[163] Q. Do you see the answer there?

MR. MAGNANINI: Can you read the answer without your glasses?

THE WITNESS: Yeah, I do like it.

BY MR. MARGOLIS:

Q. I was going to say feel free to put your glasses on.

It states "Your time starts when you arrive at your work assignment location." "It continues for the shift" until you leave your work assignment location "(LESS ANY BREAK taking longer than 15 minutes)"; correct?

A. Correct.

Q. Do you see the next paragraph there, "Who is responsible for the correctness of the timesheet and the timely submissions of same?"

A. Yes.

Q. Let me read the answer. "The person whose name is entered in the name block on the time sheet is responsible for the correctness of the data on the timesheet and timely submission of the timesheet to the person's supervisor or to the Payroll [164] Department."

A. Correct.

Q. So you understood at the time that you were first hired by KBR that you were the person responsible for the correctness of the data on your time sheet; correct?

MR. MAGNANINI: Objection to form. It actually goes on to state something else.

THE WITNESS: I understand.

BY MR. MARGOLIS:

Q. And you understood that at the time; right?

A. Yes.

Q. Then if you look to the bottom part of that in italics, "If anyone has reason to believe hours on a timesheet are not accurately recorded in accordance with KBR procedures, they must address the defi-

ciency with the person and/or the person's Supervisor."

And then in bold "Submittal of a timesheet that does not show the actual hours worked may be considered fraud or a similar irregularity under the [165] Halliburton Code of Business Conduct."

Do you see that?

A. I do.

Q. As you understood at the time, if you were to record hours on your time sheet that you didn't actually work, that could be considered fraud under the code of business conduct for Halliburton; right?

MR. MAGNANINI: Objection; form.

THE WITNESS: Absolutely.

BY MR. MARGOLIS:

Q. And that's the same code of conduct that you agreed as a condition of your employment when you first came to work for KBR; right?

A. Yes.

Q. You say when you received training that you were required to have your time card on your person at all times; is that right?

A. Yes.

Q. Who gave you that training?

A. I believe I was told that in Houston and at Al Asad and at Ar Ramadi.

[166] Q. Do you recall whether any of that was ever in writing?

A. I believe it's in writing in some form.

Q. Do you know where?

A. I don't know what document. They made it very clear.

Q. Who's "they"?

A. KBR's supervisors.

Q. Who are "they," the persons that made it clear to you?

A. Warren Smith specifically made it very clear every Saturday night I complained about the time sheet fraud to him.

Q. Let's stop right there. Every Saturday night you had a conversation with Tom Smith, is that your testimony, about time sheet fraud?

A. From the time they required us to keep our time sheets in the O&M office, every Saturday night he was there to watch us sign the time sheets and every Saturday night I told him this was time sheet fraud, and he said I don't let them have my time sheet, I keep my time sheet with me, but you need to [167] sign yours.

Q. What was time sheet fraud? What were you telling him was time sheet fraud?

A. We were reporting hours before the end of the day.

Q. What time were you filling out and completing your time sheet?

A. I believe it was around 6:00 p.m. maybe. There would be an announcement go out over the radio, come in, get your time sheets filled out so we can get the processing done in time so you can get paid on time before 7:00 p.m.

Q. This is once a week; right?

A. Yes.

Q. This was on Saturdays?

A. I believe so, yes.

Q. So at 6:00 at night there was an announcement that went out over what, a camp loudspeaker?

A. Camp radios.

Q. To require the trades employees to come to sign their time sheets?

[168] A. Yes.

Q. And you're saying each time you did that, you complained to Tom Smith it was fraud for you to fill out your time sheet an hour early on Saturday?

A. Yes.

Q. Any other complaint at that time you made to Tom Smith about time sheet fraud during these conversations?

A. I made a complaint to Tom Smith when they issued the directive that we could no longer be in possession of our own time sheets.

Q. What did Tom Smith tell you --

A. He said you don't have a choice. They're going to stay in the O&M office from now on.

Q. Did he tell you why?

A. No, not that I can recall exactly.

Q. Was there something fraudulent about that, in your opinion?

A. I thought it was very important that I always have my time sheet with me in case a government auditor asked me to show it to him. I thought that was just as important as having my [169] military ID,

my KBR ID at all times, too.

Q. Did a government auditor ever ask you for your time sheet?

A. No.

Q. How big a camp was Ar Ramadi?

A. Geographically or personnel?

Q. Geographically.

A. It was small. It couldn't have been more than a half a mile across, I believe.

Q. So if a government auditor had asked you for your time sheet, how long do you think it would have taken you to go to O&M and get a copy of it?

A. It wouldn't have taken long at all.

Q. Any other complaint you made to Warren Smith about whether or not there was time sheet fraud going on?

A. I believe I complained to him about the softball games.

Q. Anything else?

A. Not that I can remember.

MR. MARGOLIS: Can we go off the record for one moment, please.

[170] VIDEO OPERATOR: Off the record at 2:14.

(Recess.)

VIDEO OPERATOR: This is the beginning of tape 3 in the deposition of Benjamin Carter. On the record at 2:24.

BY MR. MARGOLIS:

Q. Putting before you what's been marked Exhibit

47 which for the record is also part of what's been marked as Defense Exhibit 3A in this case, do you see that, sir?

A. Yes.

Q. Do you recognize that as what was printed on the back side of the time sheets that you received while employed at KBR?

A. I think it may have been, yes.

Q. Do you recall reviewing what was on the reverse of your time sheet during the time you worked with KBR?

A. I may have reviewed it while in Houston, but I don't recall reviewing it once in Iraq.

Q. Direct your attention to a couple of the different points on here. Number 1, [171] "Responsibility" in bold. "You are personally responsible for both the accuracy and the timely submittal of your own timesheet to your supervisor."

MR. MAGNANINI: Where is that, Craig?

MR. MARGOLIS: Number 1.

BY MR. MARGOLIS:

Q. Do you understand that to be the policy that you were subject to while you were working for KBR?

A. Yes.

Q. Number 4, in bold, "Review your time sheet! Your signature on the time sheet certifies the timesheet's accuracy. Employees can be held liable if entries are falsified and can face civil and criminal penalties."

Do you understand that to be KBR policy at the time you worked there?

A. Yes.

Q. Number 6, in bold, "Duty to Report." "If asked to fill out the timesheet in a way that does not comply with labor recording requirements, or if asked to falsify labor charges, then notify Project [172] Management and/or the Government Compliance department." Do you see that?

A. I do.

Q. Do you understand that to be KBR policy at the time that you were working for KBR?

A. Yes.

Q. Number 12, in bold there, "You MUST have approval to work in advance of 12 hours per day." By the way, do you see on this copy there's a part that's highlighted in green? There was no color highlights on the reverse of the time sheet to the best of your recollection, was there?

A. No.

Q. "Advanced approval must be" -- hold on one moment.

MR. MAGNANINI: It's like the color-blindness trick.

MR. MARGOLIS: That's the unfortunate part, the blue and the -- I'm looking for a slightly better copy that might help us read that document.

BY MR. MARGOLIS:

Q. "Advanced approval must be written if you [173] are in any location other than Afghanistan or Iraq.

Working in excess of 84 hours per week requires advanced PM approval."

Is that your understanding of the policy at the time you worked for KBR?

MR. MAGNANINI: Objection to form, but you can answer.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. And going on, "If you worked more than 12 hours, you must write an explanation in the comments section of your timesheet at the end of that shift, prior to departing the work area." Do see that?

A. Yes.

Q. Is that your understanding of the policy at the time you worked for KBR?

A. Yes.

Q. We talked about a little earlier about certain things you would annotate on a time sheet.

Is it your understanding you weren't required to annotate or provide an explanation of any hours unless you worked in excess of 12 hours in a day; [174] correct?

A. I don't believe I understood it that way because I believe that I made notes of specific things I may have done on some days where I only wrote 12 hours. For some reason, somebody told me to write that in there, that I did something different so I don't know what my understanding of that was at the time.

Q. On the bottom, again in bold of that paragraph, "Employees are" -- this is in caps --"NOT," return to regular type of bold, "guaranteed 85 hours of work per week. Per the employment agreement, there is NO guarantee of more than 40 hours of work per week."

Did you understand that was the policy at the time you worked for KBR?

A. I'm trying to see where --

Q. The bottom of 12.

A. Sorry. Let me read that. Interesting.

Q. Is that your understanding of the policy at the time you were working for KBR?

A. Yes.

[175] Q. Then on 22, on the bottom where it's in caps and italicized "IMPORTANT: Failure to properly complete your timesheet as explained above may be grounds for disciplinary action, up to and including termination. ANY FALSIFICATION of a timesheet record WILL BE GROUNDS FOR DISMISSAL."

Is that your understanding of KBR policy at the time you worked there?

A. Yes.

Q. You said you made various reports with respect to time sheet fraud to Tom Smith; correct?

A. Correct.

Q. And to Suzanne Raku Williams, or did you not make any time sheet fraud reports to Suzanne Raku-Williams?

MR. MAGNANINI: I don't know that he testified to that.

THE WITNESS: I don't recall saying anything to Suzanne Raku Williams about time sheets.

I did to others, but not her.

BY MR. MARGOLIS:

Q. Walter Meyers; correct?

[176] A. Correct.

Q. We discussed that.

Did you ever make any report to government compliance as indicated here in the policy about concerns about being forced to sign a time sheet that you believe is inaccurate?

MR. MAGNANINI: Objection to the form.

THE WITNESS: No. I didn't know who to speak to. I think I saw a government auditor once, but I'm not sure that's what he was, so I didn't, no.

BY MR. MARGOLIS:

Q. Ever contact the company's code of business conduct hotline to make a report of conduct that you believe would have violated that code of business conduct relating to time sheet fraud?

A. No. I wanted to keep my job.

Q. But you knew that a condition of your job was to follow that policy; right?

A. I did, but the unwritten policy was 12 hours a day, 84 hours a week regardless.

Q. You knew you had an obligation to report [177] any instance where somebody was instructing you to record time falsely; right?

A. I did.

Q. You knew, sir, isn't it true, that you could have reported a concern anonymously through the code of business conduct system; right?

MR. MAGNANINI: Objection to form.

THE WITNESS: No, I did not know that.

BY MR. MARGOLIS:

Q. You did not know that?

A. No.

Q. You didn't know that was part of the code of business conduct manual that you certified you read in its entirety before you signed your agreement?

A. Don't remember reading that.

Q. When you said you did read it when you signed your agreement, that wasn't true?

A. No, that's not true. I read it all. I may not have comprehended it all.

Q. You didn't know there was a hotline that [178] you could call?

MR. MAGNANINI: Objection to form.

THE WITNESS: I really don't recall anything, any kind of hotline.

BY MR. MARGOLIS:

Q. Didn't know there was an e-mail address you could contact?

A. No. The only e-mail address in that regards, as I remember being told that I could send an e-mail to the president of Halliburton if I had a problem, but I never had his e-mail address, like an open-door policy kind of thing. That's all I recall.

Q. So your testimony is that you recall being told you could send an e-mail to the head of Halliburton, but you don't recall being told you could send an e-mail or contact anonymously the company's code of business conduct hotline or mailbox?

A. I don't remember that.

Q. Do you recall receiving code of business [179] conduct training when you joined the company?

A. Today I don't remember. I'll stipulate that we did if we did.

MR. MAGNANINI: You're not here to stipulate. You're a fact witness, Mr. Carter.

THE WITNESS: I don't know. I don't remember.

BY MR. MARGOLIS:

Q. When you needed to e-mail an employee, couldn't you go on the system, on the company's intranet and find the employee's e-mail?

A. I don't know if I knew how to do that. I don't think I knew how to do that.

Q. You did send e-mails to people in the company?

A. Yes.

Q. You had an e-mail account, right, from the company?

A. Yes.

Q. You didn't know how to find someone's e-mail address if you needed it?

A. I honestly don't know that I ever pursued [180] it -- I didn't look-- I didn't know how to do that.

I corresponded with other Halliburton ROWPU people, but I didn't look them up. They looked me up.

Q. The company had an intranet or central page that had its code of business conduct policies on it; right?

A. I don't know.

Q. You don't recall looking at that?

A. I don't think I've ever went to Halliburton's main page.

Q. The code of business conduct policies were

posted at the camp, weren't they?

A. Don't have a clue. I don't know.

Q. If you didn't think you could contact the company, why couldn't you just contact the government -- did you ever contact the government relating for the allegations of time sheet fraud?

A. I could have.

MR. MAGNANINI: Objection to form. I don't want you to discuss anything, contacting the government through an attorney. That would be privileged communications.

[181] MR. MARGOLIS: Let's cover this now because that's going to be a subject of a motion later in the week. Are you instructing him not to answer any questions related to any information that was communications communicated by Mr. Carter to counsel for the government? I don't want to go off the record.

MR. MAGNANINI: I'm saying his conversations about him contacting the government, if it involved his attorney, are privileged.

MR. MARGOLIS: What's the basis?

MR. MAGNANINI: Common interest privilege with the government.

MR. MARGOLIS: So you're instructing him not to answer any such questions?

MR. MAGNANINI: I don't know what your questions are going to be, so I'm not saying there's a blanket instruction that he's not answer anything. What I advised him was that if he had contacted the government about this with his lawyer, those conversations with his lawyer are privileged.

We also believe there's a set of common [182] in-

terest privilege in conversations between someone who is a relator and the government during their investigation that would also be protected.

As you said, Craig, there is a motion coming up. We can make a proffer, I guess would be the best word, to let Mr. Carter answer a question about his conversation or his disclosure, shall we say, that focused on the motion with the government as a way of resolving the motion for Friday.

MR. MARGOLIS: The motion -- the Rule 72 objection?

MR. MAGNANINI: Right.

MR. MARGOLIS: Maybe we should go off the record for a moment and then we can decide to go back on.

MR. MAGNANINI: Why don't we do that.

MR. MARGOLIS: Why don't we go off the record for a second.

VIDEO OPERATOR: Off the record at 2:39. (Recess.)

VIDEO OPERATOR: Back on the record at 2:59.

[183] BY MR. MARGOLIS:

Q. Putting aside for the moment, Mr. Carter, any communications you may have had with or through counsel with the government, you never reported your concerns about timekeeping to any agent of the government, did you?

MR. MAGNANINI: Objection; form.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. You never raised it with -- do you have some-

thing you want to say?

A. Are we talking my time while I was employed?

Q. Let's start with the time while you were employed.

A. No, I didn't.

Q. And you knew you could have made a report to Army CID; right?

A. I don't believe I knew that.

Q. You didn't know there were Army Criminal Investigation Division agents in Iraq you could have made a report to?

[184] A. No.

Q. How about the Defense Department Inspector General?

A. I think I was aware that -- there were so many titles -- I think because we would occasionally be given advanced notice that we can't all be in the hooches because a DOD inspector is coming --

Q. Let's talk about that right now. When did that happen?

A. That happened a couple times. For instance, the time we were all directed to go pick up trash, that was because a DOD inspector was coming. That's what I was told by Walter Meyers.

The crafts and trades people were told that.

It was so we would look busy while he was there.

Q. Is that what he said, so you will look busy, those are words coming out of his mouth?

A. Absolutely.

Q. When did he tell you that?

A. The day before -- I think it was the morning we went and did the garbage pickup.

[185] Q. Do you recall when that was?

A. No, I don't.

Q. Do you recall what month it was in?

A. Not specifically. I would guess to say maybe late February.

Q. Any written record you're aware of this DOD inspection?

A. I'm sure there is through KBR ops, through their offices because they always knew because they arranged for the billeting for them to stay while they were at Ar Ramadi.

Q. Have you seen it, this documentation?

A. No. I was told this.

Q. By who?

A. By Ken May.

Q. He was a friend of yours; right?

A. He was an acquaintance.

Q. He told you that at the time; right?

A. Yes.

Q. So you would know, then, through him, if you wanted to, where the inspectors were staying; right?

[186] MR. MAGNANINI: Objection to form.

Assumes facts not in evidence.

THE WITNESS: I suppose if I would have asked, but I didn't want to know anything.

BY MR. MARGOLIS:

Q. You were concerned enough about these time-

keeping fraud allegations at the time that you didn't want to report them to the government. Is that your testimony?

MR. MAGNANINI: Objection; vague.

THE WITNESS: I wanted to keep my job. My conscience bothered me from the time I arrived at Al Asad until the day I left, so I wanted to, but not enough to lose my job over it.

BY MR. MARGOLIS:

Q. But you were not concerned about making complaints to your supervisors about it, about how that would affect your job?

MR. MAGNANINI: Objection.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. But you were concerned if you would report [187] to the government, you would lose your job?

A. Correct.

Q. You were concerned if you made any reports to superiors within KBR above these persons who directed you to report time on your time sheets falsely, that you would lose your job?

MR. MAGNANINI: Objection; vague, but you can answer.

THE WITNESS: Yes, I was worried about that. I reported it to the number 2 manager, Tom Smith, Warren Smith, project manager at Ar Ramadi, but yet, at the same time, he threatened us every morning with termination if we did anything wrong, if we didn't follow their rules.

And he said there's hundreds of people in Houston

waiting to replace you. So it was always a hostile environment on we can terminate you any time we want.

BY MR. MARGOLIS:

Q. When you left the company, did you report it on the way out?

A. No.

[188] Q. You weren't worried about your job then?

A. Right.

Q. You didn't tell anybody at KBR then that you had concerns about timekeeping fraud; right?

A. Right.

MR. MAGNANINI: Objection; vague.

THE WITNESS: I was just worried about getting home.

BY MR. MARGOLIS:

Q. You had an exit interview where you had the opportunity to make statements about the reasons why you left; right?

MR. MAGNANINI: Objection; vague. You can answer.

THE WITNESS: No, I didn't.

BY MR. MARGOLIS:

Q. You didn't have an exit interview?

A. I had a brief interview. Minutes before I was getting on the airplane in Al Asad about -- I was questioned about whether I was suntanning at Ar Ramadi. They asked, whoever the administrator was, [189] asked me if I was suntanning while I was at Ar

Ramadi, and I said yes, I was, during my lunch break. They didn't ask me why I quit.

Q. You're testimony is nobody ever asked you why you quit from KBR?

A. I don't believe anybody did.

(Defendant's Exhibit 48 identified.)

BY MR. MARGOLIS:

Q. Hand you what we've marked as Exhibit 48, Mr. Carter. That's an exit interview form, is it not?

A. It appears to be, yes.

Q. That's your signature at the bottom, isn't it?

A. Yep.

Q. It's dated March 31, 2005; right?

A. Yes.

Q. There's the signature of an HR representative next to your signature; correct?

A. Yes.

Q. That's in your handwriting, is it not, sir?

[190] A. My signature is my handwriting and the writing in paragraph 6 appears to be mine and none of the rest of it is mine.

Q. Do you recall now that you had an exit interview where you were asked questions about why you were leaving Iraq?

A. Can I read this?

Q. Sure.

A. It's hard to read some of this writing.

This confirms everything I just said except the part about time sheets.

Q. Can you direct me here where you make a complaint about time sheet fraud as one of the reasons why you were leaving Iraq?

MR. MAGNANINI: Objection.

THE WITNESS: Yes. I think I did it in number 6 and the only part of this that I actually wrote where it says "Sometimes we filled time sheets at 7:00 p.m. other times at 6:00 p.m." and "Sometimes we had Sundays off, others not."

BY MR. MARGOLIS:

Q. Is that the fraud, sir?

[191] MR. MAGNANINI: Objection; calls for a legal conclusion. You can answer.

THE WITNESS: I understood that to describe part of the fraud, yes.

BY MR. MARGOLIS:

Q. You had the opportunity to lay it all out there in paragraph 6; right, for KBR on your way out?

A. I'm sure I did.

Q. In fact, you didn't use the entire space on 6; correct?

A. Correct.

Q. You could have put more comments on the back side of the form; right?

A. I could have, yes.

Q. Does the word "fraud" appear here anywhere, sir?

A. I don't believe it does.

Q. Anything here about being required to report 12 hours a day when you didn't work it, sir?

A. Well, I think it says that clearly, that [192] we filled out our time sheets at 6:00 p.m. and we didn't work on Sundays.

Q. Did you record here that you were required to put down 12 hours a day when you didn't work it?

A. No.

Q. At the time you filled out this form, you weren't concerned about losing your job, were you, sir?

A. No. My only concern was getting all the way back home without any repercussions.

Q. Is it your concern -- it's your testimony today the reason you didn't say anything here about your time sheet fraud allegations is you were concerned if you did, you wouldn't be able to get home?

MR. MAGNANINI: Objection to form. Calls for facts not in evidence.

THE WITNESS: I was truly concerned I wasn't going to be able to get back home. I was told if I said I had a medical condition, that KBR wouldn't let me leave Iraq until I said that I didn't.

[193] Having that knowledge, being told that, that you can't claim a medical condition because they won't let you go back home if you do have one, I was as brief as possible and just wanted to go home.

BY MR. MARGOLIS:

Q. Who told you that, about the medical conditions?

A. I think that was Harold Orr.

Q. When did he tell you that?

A. I don't recall, sometime during the time I was there.

Q. Did anybody force you to put anything into paragraph 6, sir?

A. No.

Q. That's an optional space; right?

A. I suppose.

Q. So if your concern was to write as little as possible so you could get home without being interfered with, why did you write anything in response to paragraph 6?

A. I don't know. I don't even remember [194] writing this. I don't understand why this is somebody else's handwriting and mine's at the bottom.

Q. Do you see at the bottom, "The HR Representative should complete the following questionnaire during and/or after the Exit Interview"?

A. I do.

Q. Paragraph 6, in any event, is your handwriting; right?

A. Yes, it is. It's interesting.

Q. So you decided to put comments in paragraph 6. Just didn't say anything about timekeeping fraud other than having Sundays on and sometimes off and filling out time sheets at 7:00 p.m. and other times at 6:00 p.m.?

MR. MAGNANINI: Objection; vague. Calls for legal conclusions. You can answer.

THE WITNESS: Sure. It doesn't make sense to me why I wrote in 6 and didn't write in 1, 2, 3, 4 and 5 when the questionnaire says this is to be used by the HR representative. So I don't know why [195] I didn't write more or less other than I just wanted to get

home safe.

BY MR. MARGOLIS:

Q. You transited through Camp Al Asad on the way back to the United States; is that correct?

A. Yes.

Q. There were government investigators and auditors at Camp Al Asad as well; correct?

MR. MAGNANINI: Objection to form.

Assumes facts not in evidence.

THE WITNESS: I don't know.

BY MR. MARGOLIS:

Q. How big a camp is Al Asad?

A. It was very big geographically. It was big. It was well established.

Q. Did you have a rough idea of how many troops were there?

A. No, I didn't.

Q. When you say "well established," what do you mean?

A. It meant all of the KBR man camp, they had [196] lots and lots of housing units, and they had built established offices like the ROWPU was running. They had a PX and a big DFAC. It was a big base. Who know how many soldiers were there.

Q. You don't know if there were any government investigators or auditors there that you could have reported your concerns to?

A. I don't.

Q. How about when you got back to the United States, before you retained counsel? Did you make

any reports to government agents or investigators about your timekeeping fraud allegations at that time?

A. I don't believe so.

Q. I assume at that time you weren't concerned about losing your job; right?

A. Right.

Q. You weren't concerned about getting home; right?

A. Correct.

Q. You still didn't report these fraud allegations to the government prior to you retaining [197] counsel?

MR. MAGNANINI: Objection. It's also vague as to time sheets, but go ahead.

BY MR. MARGOLIS:

Q. I'll make it more specific. Did you report any of your allegations with respect to time sheets or timekeeping fraud after you returned to the United States and prior to your retaining counsel to any investigator or auditor of the government?

MR. MAGNANINI: Objection; calls for a legal conclusion. You can answer.

THE WITNESS: I don't believe so. I don't think I did.

MR. MARGOLIS: I'm going to ask, what's the basis for the legal conclusion? What legal conclusion am I asking him?

MR. HOLMES: You're characterizing something as timekeeping fraud without defining that. The timekeeping issue in this case is a set of evidence

within a scheme of fraud that was set forth in the first amended complaint.

[198] BY MR. MARGOLIS:

Q. Did you tell anybody from the government before you retained counsel and after you returned that you were directed to record 12 hours a day when you didn't work it?

A. As a matter of fact -- I believe I told Neal Higgins. He worked in the government.

Q. Worked for the Senate, the Democratic Policy Committee; correct?

A. Correct.

Q. And for the Democratic Party; correct?

A. Right.

Q. In writing, I suspect, or did you say you're doing this orally?

A. I don't recall, to tell you -- I believe he got it from me in an e-mail, but I don't know for sure.

Q. Didn't call the FBI and tell him about it; right?

A. No.

Q. Didn't call Army CID and tell them about [199] it; right?

A. No.

Q. Didn't call the Special Inspector General for Iraq Reconstruction and tell them about it; right?

A. No.

Q. At the time you were talking to Neal Higgins, you were actively speaking to the press about allegations relating to water quality in Iraq; right?

MR. MAGNANINI: Objection to form.

THE WITNESS: I don't know that I'd say I was actively speaking to the press by the time I had spoke to Neal Higgins. During that time frame from the day I got home for a year and a half I was trying to get seen by a doctor, and that's what I was primarily working on, was to get Halliburton to agree to have me be seen by a doctor.

BY MR. MARGOLIS:

Q. Did you give an NPR interview, sir?

A. I don't know.

Q. Do you recall appearing in Iraq For Sale, [200] the video?

A. Yes. Oh, NPR.

Q. National Public Radio.

A. Yes.

Q. Do you recall doing various blogs?

MR. MAGNANINI: Objection; vague.

THE WITNESS: I don't. Say I don't because I don't really know what you mean by doing blogs.

BY MR. MARGOLIS:

Q. Did you participate and get interviewed for a story by HalliburtonWatch.com?

A. I did.

Q. All of those things had nothing to do with you seeing a doctor; right?

A. Right. They had to do with water contamination.

Q. But none of those things report any allegation that anybody forced you to record 12 hours on time sheets that you didn't work; right?

MR. MAGNANINI: Objection; vague. You can answer.

[201] THE WITNESS: I assume so.

BY MR. MARGOLIS:

Q. Do you know or not?

A. I don't know.

MR. MAGNANINI: Don't assume. You're here as a fact witness.

BY MR. MARGOLIS:

Q. You wouldn't recall that, you don't think?

A. I don't recall that.

(Defendant's Exhibit 49 identified.)

BY MR. MARGOLIS:

Q. Putting before you Defense 49.

Do you recognize this, this blog "Progressive Future"?

A. I do.

Q. You're "Guest Blogger Ben"; right?

A. I was not aware of that.

Q. Did you or did you not post this blog entry, sir?

A. I did not.

Q. Where it goes on and says on the bottom in the first person "I had been operating my own [202] company" and goes on, you're saying that's not you?

MR. MAGNANINI: Objection to form. That mischaracterizes his testimony.

THE WITNESS: I did not post this to this Web site.

BY MR. MARGOLIS:

Q. Did you authorize anybody else to post it on your behalf?

A. I may have. Kate Drazner is who I thought put this on here, a reporter.

Q. Did you work with Kate Drazner to develop this for the blog?

MR. MAGNANINI: Objection to form. Vague as to "develop."

THE WITNESS: I answered her questions.

BY MR. MARGOLIS:

Q. Second paragraph, "Carter participated in a series of e-mail interviews with Progressive Future's Kate Drazner in June to talk about his experiences and spread the word about his quest to bring KBR to justice. Here's his story."

[203] Is that accurate?

A. Yes.

Q. Did you tell her anything about your allegation that you were forced to record 12 hours a day when you didn't work 12 hours a day?

A. I imagine I did.

Q. You're speculating or do you recall?

A. I'm sure I told her about the 12 hours on Sundays and the entire base at KBR, KBR employees had Sunday off and didn't work for the 12 hours.

That's as far as I went.

Q. That's because you specifically recall that?

A. I do recall telling her that, yes.

Q. Is it your testimony she's the one who posted

this to the blog using the first person as a narrative by you?

MR. MAGNANINI: Objection. You can answer.

THE WITNESS: I don't know who did it. I know that I certainly didn't put it there.

(Defendant's Exhibit 50 identified.)

[204] BY MR. MARGOLIS:

Q. Putting before you what's marked Exhibit 50. Do you recognize this as an e-mail from you to a Zach Pheller and Robert Greenwald on June 6, 2008?

A. Yes. Is there more?

MR. MAGNANINI: Yes.

BY MR. MARGOLIS:

Q. It starts with an e-mail at the end on pages 446 and 447 from you to Kerry Candaele, C-a-n-d-a-e-l-e, and Robert Greenwald "Great news!"

Do you see that, sir?

A. I do.

Q. Who's Kerry Candaele and Robert Greenwald?

Who are they?

A. Robert Greenwald, to my knowledge, owns Brave New Films. Kerry Candaele -- I don't know how to pronounce his last name exactly -- is the gentleman who interviewed me for the Brave New Films of Iraq for Sale.

Q. You're informing them then about the great news that your Qui Tam case has been unsealed; is that correct?

[205] A. Correct.

Q. Which you describe here as a "sealed case

against Halliburton for providing contaminated water to the troops in Iraq has at long last been unsealed yesterday." Am I reading that correctly?

A. Correct.

Q. Nothing in here about time sheet fraud; correct?

MR. MAGNANINI: Objection.

THE WITNESS: I don't see anything in here about time sheet fraud.

BY MR. MARGOLIS:

Q. Anything in here about being required to report more than 12 hours in a day?

A. No.

MR. MAGNANINI: Objection.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. Then you'll see there's an e-mail to you from rg@rgpinc.com on 5 June 2008. Do you see that?

[206] MR. MAGNANINI: What page is that?

MR. MARGOLIS: The next page, 446.

THE WITNESS: I see that, yes.

BY MR. MARGOLIS:

Q. "This is really really great. Can you do a quick blog that we can post and get around?"

A. I see that, yes.

Q. And then above that, you reply. Do you see your reply on June 5, 2008 to Robert Greenwald?

A. Yes.

Q. "I'm working on writing up a blog right now

Robert. I should have something by tomorrow at the latest." Do you see that?

A. Yes.

Q. What blog were you writing up?

A. I don't know.

Q. But you were doing blogs, weren't you, sir?

A. No, I wasn't. I have never posted a blog, to my knowledge.

Q. Why did you tell Robert Greenwald you were working on writing up a blog right now?

A. I think that was me just identifying in [207] response to his saying this is really, really great, can you do a quick blog that we can post. I took that to mean a story. Maybe that's what a blog is.

What I'm referring to in here is what Kate Drazner was doing in her interviewing with me. I believe that's what that's about.

Q. By the way, on the first page of this e-mail, you send -- this document, you send an e-mail to Zach Pheller, Robert Greenwald on June 6, 2008. Do you see that, sir?

A. I do.

Q. You say "I'm sorry to say that I celebrated a tad too much last night so I'm late getting started." Do you see that?

A. Yes.

Q. And you went on. You may have a description here. The second paragraph here, a paragraph, you're reporting a time sheet allegation to these gentlemen?

MR. MAGNANINI: What are you referring to, Craig?

MR. MARGOLIS: Paragraph 2.

[208] MR. MAGNANINI: What's the question? Can you repeat that?

BY MR. MARGOLIS:

Q. Is this your allegation that you were required to report 12 hours a day when you were not, in fact, working it?

A. At Al Asad.

Q. At Al Asad.

But not Ar Ramadi, at least as reported here?

MR. MAGNANINI: Excuse me for a minute,

Mr. Carter. Let me read this. Okay. So the question is pending. I'll object to the form.

Calls for legal conclusions. You can now respond.

THE WITNESS: Could I hear the question again?

BY MR. MARGOLIS:

Q. Is that the timekeeping allegation -- with respect to Al Asad, do you make any timekeeping allegation to the time you spent at Ar Ramadi in this e-mail?

A. It doesn't say that, but I felt like not [209] doing any ROWPU work was time sheet fraud, so I didn't call it time sheet fraud, but it was not doing any work.

Q. Your view is even though you were doing honest work, as you stated earlier, it was time sheet fraud for you to do that work as a ROWPU operator and to record it on your time sheet? Is that your testimony?

MR. MAGNANINI: Objection; mischaracterizes

his prior testimony.

MR. MARGOLIS: I'm just asking him straight now whatever his prior testimony was.

BY MR. MARGOLIS:

Q. Is that your position?

A. No.

Q. It's not your position?

A. No, it's not.

Q. So if you were doing other work-- other than working on ROWPU and recorded that time on your time sheet, you don't have any problem with having been paid for that and that having been billed to the government?

[210] MR. MAGNANINI: Objection. It calls for a legal conclusion. You can answer.

THE WITNESS: I absolutely had a problem with it.

BY MR. MARGOLIS:

Q. With you doing work other than ROWPU work and putting it on a time sheet?

A. Yes. Building entertainment centers was not supporting the troops. I had a conscience problem with it.

Q. Let's take building the guard tower, something you call as honest work. Do you have a problem with putting that on a time card and getting paid for it?

A. Not at all.

Q. Any problem that KBR would bill your time to the government for that?

MR. MAGNANINI: Objection; calls for a legal con-

clusion. You can answer.

THE WITNESS: No, not at all.

BY MR. MARGOLIS:

Q. Back to the question of whether or not [211] you've ever blogged, show you Defense Exhibit 51.

(Defendant's Exhibit 51 identified.)

BY MR. MARGOLIS:

Q. Putting before you a printout from CNN iReport with something that starts with "I found contaminated water in Iraq working for Halliburton" dated June 30, 2008 in Boise, Idaho posted by Ben Carter. Is that you, sir?

A. It sure is.

Q. On the next page that's your photograph; right?

A. Yes.

Q. So this you did post?

A. I did.

Q. You don't think this is a blog?

MR. MAGNANINI: Objection.

THE WITNESS: I didn't think it was.

MR. MAGNANINI: Vague. You can answer it.

BY MR. MARGOLIS:

Q. What would you define this to be?

A. Well, I'm not trying to mislead you whatsoever. I think I may not understand blogs very [212] well. I don't know about blogs. This was in watching CNN one day, they asked to send in these reports to their CNN iReport. If CNN iReport is a blog, then yes, I did

a blog, but I didn't realize that that's what that is.

Q. Getting back to what we were discussing earlier, prior to the time that you retained counsel, I want to make sure we have this clear, you did not report your allegation that you were directed to record 12 hours a day on time cards for time that you did not spend working to any agent or employee of the government; corrects?

A. Neal Higgins an employee of the government? That's the only one I'm aware of.

Q. You're saying that you did this -- had this conversation with Neal Higgins before you ever retained counsel?

A. Yes.

Q. And you reported that time card allegation to him at that time?

MR. MAGNANINI: Objection; vague, but you can go ahead.

[213] THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. The allegation, among others, that you were directed to record 12 hours a day that you didn't work?

MR. MAGNANINI: Same objection.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. When did you do that?

A. I would have done it in December, I believe, of '05. It was about a month or two prior to the DBC testimony. And then I would have verbally told him when I was in Washington before my testimony, the

day before.

Q. Was that part of your testimony, that allegation in the DBC?

A. I don't believe so.

Q. Why not?

A. Because the contaminated water was the big issue, I think. I don't know why it didn't. I tried. I don't know.

Q. Were you prevented from discussing it?

[214] A. No.

Q. You prepared a written testimony, isn't that correct, sir?

A. Yes.

Q. And you had control over what you put into the written testimony; right?

A. Yes.

Q. You didn't say anything about being directed to work 12 hours a day when you didn't work 12 hours a day in that written testimony, did you, sir?

A. No.

Q. That wasn't because somebody told you you couldn't say that, is it?

A. No.

Q. When did you retain counsel?

A. Well, I think it officially occurred shortly after I testified at that hearing, but I had spoken with them prior to then.

Q. Who's "them"?

A. With Don Warren and his investigators.

Q. I'm not going to ask.

[215] MR. MAGNANINI: Okay.

BY MR. MARGOLIS:

Q. How did you get introduced to Don Warren?

A. By, I believe it was Dina Rasor.

Q. Who's Dina Rasor?

A. I don't know exactly what her title is. I don't know.

Q. How did you get in contact with Dina Rasor?

A. Over the Internet -- I did a search for whistleblower attorneys, not knowing anything about it, and that directed me somehow to a Web site that she was operating, so I sent a question. She responded and proceeded to interview me and ask what happened--

MR. MAGNANINI: Mr. Carter, again, I instruct you not to go into the details since she was Mr. Warren's agent.

MR. MARGOLIS: A number of e-mails have been produced related to these communications prior to the retention of Mr. Warren.

MR. HOLMES: We've had e-mails produced in [216] the fall of 2005, and so he can speak to the content of those e-mails.

MR. MARGOLIS: And communications before that time frame. This has been a subject of the motion to compel and e-mails were taken off the privileged log based on representations by yourself.

MR. HOLMES: I think we're referring to the e-mails here. I don't know that he's testified to--

MR. MARGOLIS: Are you claiming that the e-mails aren't privileged, but communications are? I

just need to understand it because we can have a motion to practice on this alone.

MR. HOLMES: No, Craig. I don't know if you're correctly characterizing his testimony correctly. We're talking about an e-mail right now.

BY MR. MARGOLIS:

Q. Did you ever speak to Dina Rasor or Bob Bauman by telephone or by other means besides e-mail before you retained Don Warren?

A. I think so.

Q. What did you discuss?

[217] A. I don't recall. I think I spoke with Bob Bauman.

Q. How did you get introduced to Bob Bauman?

A. By Dina Rasor.

Q. What did you discuss with Bob Bauman?

A. Just what I witnessed in Iraq.

Q. Does that include being directed to work 12 hours a day when you did not, in fact, work 12 hours a day?

A. Yes.

Q. You're saying you told Bob Bauman of that?

A. I'm sure of it.

Q. Is there anybody else that you can recall reporting the allegation that you were directed to work 12 hours a day when you did not, in fact, work 12 hours a day prior to the time you retained counsel?

MR. MAGNANINI: Objection; calls for a legal conclusion. You can answer.

THE WITNESS: I don't recall any other. (Defend-

ant's Exhibit 52 identified.) BY MR. MARGOLIS:

[218] Q. Put before you copies of what's been marked Exhibit 52. This is an e-mail, sir, is it not, that you sent to Dina Rasor and copied owlmay300@yahoo.com on October 4, 2005; is that correct?

A. It appears to be, yes.

Q. Owlmay300@yahoo.com is an e-mail address for Ken May; isn't that right?

A. That's right.

Q. At the time you sent this e-mail, both you and Ken May were considering whether or not to be co-plaintiffs in a lawsuit against KBR; right?

A. I don't know if that would be an accurate characterization.

Q. Were you and Ken May not considering a lawsuit against KBR?

MR. MAGNANINI: At that time.

THE WITNESS: At this time, in October, I don't know that either of us knew much about Qui Tam so I don't know. I need to read this. Maybe that would refresh my memory.

MR. MAGNANINI: Yes. Please read the [219] document before you answer.

THE WITNESS: Boy, you already know everything I've told you.

MR. MAGNANINI: But that's not an answer to his question.

BY MR. MARGOLIS:

Q. Do you recall sending the e-mail?

A. Yes. After reading it, I now remember this.

Q. Is this what you also told Bob Bauman, or did you tell Bob Bauman something different?

A. I don't recall if I told Mr. Bauman something different or if I just assumed that Dina was forwarding these to him and so therefore, I assumed he knew. I don't know.

Q. Dina Rasor and Bob Bauman were business partners; is that right?

A. That's my understanding.

Q. Do you have any reason to believe you would say one thing to Robert Bauman and something different to Dina Rasor about what happened in Iraq?

A. I have a reason to believe that, yes.

[220] Q. Why?

A. Because it was Robert Bauman who physically one-on-one interviewed me for their book that they wrote together, the title "Betraying Our Troops" or something like that. So I spent more time face to face with Robert Bauman.

Q. When was that? When were you interviewed for a book?

A. I don't know when that was.

Q. Before or after you sued KBR under the False Claims Act?

A. I don't know.

Q. Getting back to this e-mail, sir, I'm going to direct your attention to the paragraph that begins "Every Saturday we were called on the radio to come to the office and falsify our time sheets." Do you see that, sir?

A. I do.

Q. Is that that statement what you've already testified about with respect to being called into the office on Saturdays to fill out your time sheets an hour before the close of business?

[221] A. Yes.

Q. The next piece here, "Management went as far as to not allow us to even possess our own time sheets any more. We were told this was for our own good. Ridiculous."

Is that the allegation you've already discussed with respect to being directed by KBR to keep the time sheet at a central office as opposed to on your person?

MR. MAGNANINI: Objection. "Allegation" is vague, but you can answer it.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. And then you go on to describe at Saturdays at 6:00 signing time sheets in front of management and writing down that we were signing out at 7:00 p.m. an hour early on Saturdays; is that correct?

A. Correct.

Q. That's what you've testified about earlier today?

A. Yes. That's one of them, yes.

[222] Q. And then there is the bigger fraud which was "we all had Sunday off work paid in full." Is that what you testified about earlier with respect to either playing softball or cleaning one's hooch or washing one's vehicle on a Sunday?

A. Yes.

Q. You did not tell Dina Rasor, however, that you were directed to record 12 hours a day each day for work you did not perform; is that correct?

A. I disagree.

Q. Can you point me to the point in here where you say that?

A. I think it says that where it says -- let's see. "I was told by my manager Walter Meyer that Sunday was our day off to wash our truck or clean our hooch. But that we still wrote 12 hours work on our time sheets.

Q. That's for Sundays; correct?

A. Yes.

Q. Are you saying today the only day you were directed to write down 12 hours a day for work you did not perform was a Sunday?

[223] MR. MAGNANINI: Objection.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. Did you tell Ms. Rasor about any other occasion aside from signing out an hour early on Saturdays and playing softball on Sundays and recording 12 hours a day, were you directed or required to report 12 hours a day on a time card that you did not, in fact, work?

MR. MAGNANINI: Objection; vague.

You can answer.

THE WITNESS: The best I can recall, I definitely discussed that with Dina Rasor about in a broad sense that we all got 84 hours a week. She was well

aware of it, so we discussed it that way.

I assumed that she knew because we weren't doing any ROWPU work that my time sheet was a fraud the entire time. That was my intent with that.

We weren't doing any work.

BY MR. MARGOLIS:

Q. So you left that allegation off the [224] e-mail?

MR. MAGNANINI: Objection to form. Calls for legal conclusions.

THE WITNESS: Yeah, it's not in here.

BY MR. MARGOLIS:

Q. In fact, the purpose of this e-mail was to tell Dina Rasor what it is that you witnessed yourself in Iraq with respect to time fraud; correct?

MR. MAGNANINI: Objection; calls for legal conclusions.

MR. MARGOLIS: I'm asking him what the purpose was. I'm not asking him a legal conclusion.

THE WITNESS: I don't know. If you notice on the subject line, it's "RE Developments." I think this is -- I don't know what I'm replying to.

I don't know in what context this information I provided to Dina falls in.

BY MR. MARGOLIS:

Q. What makes you think you're replying to anything, sir?

A. "RE Developments," subject right under [225] the cc to -- it's from Ben Carter to Dina Rasor, carbon copy to owlmay "Subject: RE: Developments." I would have typed that in there in the subject line in re-

sponse to something that we had discussed prior.

Q. Do you have a memory of that, or are you just assuming that?

A. I know that's how I operate.

Q. So you're saying this is not a reply to an e-mail. This is based on some conversation you had with Dina Rasor?

A. I don't know. I don't know if it was a conversation or an e-mail. I'm just saying when I'm communicating with the person, in the subject line, I will put in "RE: It's sunny today but it was sure snowy last week," you know.

Q. You can recall telling Dina Rasor that you had an 84-hour workweek-- let me back up.

Did you ever tell Dina Rasor -- you didn't do it in this e-mail -- did you ever tell Dina Rasor by any other means that you were directed to work 12 hours a day when you did not actually perform that work -- excuse me, report -- scratch the question.

[226] Did you ever tell Dina Rasor that you were directed to record 12 hours a day on a time card that you do not actually work?

A. I think I did.

Q. Just not in this e-mail?

A. Right.

Q. Some other e-mail?

A. I don't know.

Q. You can't recall why you sent this e-mail; right? And I'm indicating here to Exhibit Defense 52.

A. Correct.

Q. You don't recall what you're responding to?

A. Correct.

Q. But you're sure you're responding to something?

A. Right.

Q. One thing you are sure about is you told Dina Rasor about?

A. Yes.

MR. MAGNANINI: Can we take a break, [227] Craig? We've been going an hour.

MR. MARGOLIS: Sure.

VIDEO OPERATOR: Going off the record at 3:51.

(Recess.)

VIDEO OPERATOR: Back on the record at 4:07.

BY MR. MARGOLIS:

Q. Mr. Carter, I'm going to put in front of you what's been marked previously as Defense Exhibit 8. I have another copy for you guys. Please take a minute to look through these pages. Do you recognize those documents, sir?

A. Yes.

Q. Those are your time sheets; right?

A. Yes.

Q. Do you recognize your handwriting on those documents?

A. I recognize my signature on the very first one and the hours, but whoever wrote in my name at the top, that's not my handwriting.

Q. Other than that, is it your handwriting?

[228] A. Yes.

Q. Tell me if you agree that the time sheets begin for the week of January 9, 2005 on the first page -- it might be a little easier --

A. I think I see a 9.

Q. It's probably better to refer to it as the date ending the week. If you look in the upper right-hand corner, do you see week ending January 15, 2005?

A. I do.

Q. The last page, 1201, week ending April 2, 2005. Do you see that?

A. Yes.

Q. Written in handwriting is the word "Demob" over the space for the dates March 31, 2005 and April 1, 2005. Do you see that?

A. Yes.

Q. Is that your handwriting, sir?

A. I don't believe so. The "Demob," is that what you're referring to?

Q. Yes.

A. No, that's not my handwriting.

[229] Q. Can you recognize the number 14 written on 3/30/2005 as being your handwriting?

A. I think it is, yes.

Q. I know you've looked through these. Do these represent, and the documents are consecutively numbered, the time sheets during the entire time you were employed by KBR in Iraq?

A. I'm not sure they're all chronologically in order. Yes, I believe that's all of them.

Q. On each of these pages, that's your signature on each of those, is that right, except for the last page, which I believe does not bear your signature? To be more precise for the record, what I'm asking you, where your signature appears, that would be in the block at the bottom right-hand corner of each of these documents where it says "Employee Signature," again with the exception of the last page of the exhibit?

A. Correct.

Q. You began your time working for KBR after your time -- scratch that.

You did not report time, is it correct, [230] for time that you spent in Houston, or is that incorrect?

A. I don't believe so. I think the time start, they called it wheels up, from the time we left the airport in Houston.

Q. You testified previously you could record eight hours for transit time; correct?

MR. MAGNANINI: Objection; mischaracterizes testimony, but you can answer.

THE WITNESS: That's what I was told to do.

BY MR. MARGOLIS:

Q. Regardless of what your prior testimony was, do you have an understanding today that you were not to record eight hours for travel time?

A. No. I recorded what I was told to write down, eight hours.

Q. Do you have any problem with that?

A. No.

Q. That travel time begins on the first page on

January 13, 2005; is that correct?

A. Yes.

[231] Q. Do you see there's a location code that appears before the days of the week on the time sheet?

A. Yes, I do.

Q. You see the UAE written in there?

A. Yes.

Q. That stands for the United Arab Emirates; correct?

A. Yes.

Q. Did you transit through Dubai on your way to Iraq?

A. Yes, I did.

Q. Dubai is in the UAE; correct?

A. Correct.

Q. And you see on the next page you arrive in Iraq; correct?

A. Yes. I still see a UAE on the second line for location, so it looks like I arrived in Iraq maybe on that Wednesday or Thursday. I don't know.

Q. As you sit here today, do you recall one way or the other as to whether or not you arrived at Al Asad on January 19, 2005 as opposed to January [232] 20, 2005?

A. That half hour bunker time had to have happened at Al Asad on the 19th.

Q. That would suggest to you on the 19th you actually were in Iraq; correct?

A. Correct.

Q. You didn't have any mortar attacks in Dubai, I would hope?

A. No.

Q. So you see there, sir, on the 19th and the 20th at Camp Al Asad, you recorded -- let me back up.

On the 19th you recorded eight hours of work time plus a half an hour, .5 hour bunker time; correct?

A. Yes.

Q. On Thursday, the 20th you recorded eight hours at Al Asad of work time; correct?

A. Yes.

Q. You did not begin recording 12 hours a day until January 21st of 2005; is that right?

A. Yes.

[233] Q. Where you put down 12 hours on Friday, the 21st and 12 hours on Saturday, the 22nd of January; correct?

MR. MAGNANINI: Objection; vague.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. At the risk of making sure I'm not vague, you see an 8 scratched out and then the initials BC appearing next to it on June 21, 2005; is that right?

A. Yes.

Q. Are those your initials?

A. Yes.

Q. Do you see the number 12 written in there on January 21, 2005?

A. Yes.

Q. On January 22, you see the number 12 written in on that same line; correct?

A. Yes.

Q. So those are the first two days that you record 12 hours a day during your deployment to Iraq [234] for KBR, correct, beginning on January 21, 2005?

A. Correct.

Q. Do you recall what day you arrived at Camp Ar Ramadi?

A. I don't.

Q. Let me show you what's been previously marked Exhibit 22 and see if this will refresh your recollection.

Do you recall if it was customary for an e-mail to be sent around when there was a new hire for Camp Ar Ramadi who was arriving there?

A. No, I don't.

Q. Do you know who Jurgen Stringer is?

A. Yes.

Q. Who is Jurgen Stringer?

A. He was a KBR employee. I don't know exactly what his title was.

Q. If you could turn to the second page of this document at 14726, do you see there an e-mail from Jurgen Stringer to Don Mandy, Walter Duvall, Peter Linton, Warren Smith and Walter Meyers with the subject "New Arrivals"?

[235] A. Yes.

Q. That e-mail was sent January 20, 2005 at 11:59 a.m. Do you see that?

A. I do.

Q. Those names are all the names of persons who were working -- I should say the persons to whom this e-mail was sent are all names you recognize as persons working for KBR at Ar Ramadi at that time?

A. With the exception of Peter Linton, I don't recognize that name.

Q. But you recognize the others; is that right?

A. Yes.

Q. And this e-mail indicates that a number of employees have all arrived at B4, including yourself, Ben Carter, ROWPU operator; is that right?

A. Yes.

Q. Do you see the number 61 next to your name?

A. Yes.

Q. Is that the hooch number you were assigned

[236] A. I don't know.

Q. You don't know what that number means?

A. No, I don't.

Q. Does this refresh your recollection that you arrived on the evening of January 20, 2005 to Camp Ar Ramadi?

A. It appears to be so, yes.

Q. Is it fair to say, sir, during the time you were at Camp Al Asad you only recorded eight hours a day on your time card?

MR. MAGNANINI: Objection to form. Time frame.

MR. MARGOLIS: I'll be more precise.

BY MR. MARGOLIS:

Q. During the week ending January 22, 2005, the time you spent at Camp Al Asad and during that week, for those days you only recorded eight hours a day of work time with the exception of recording an additional half an hour of bunker time on January 19, 2005.

A. I disagree.

MR. MAGNANINI: Objection. You can [237] answer.

THE WITNESS: I disagree with that.

According to this, there was four days at Dubai UAE and then the others three days were in Iraq, so I don't know how that happened.

BY MR. MARGOLIS:

Q. You just finished saying you didn't get a bunker attack in Dubai; is that correct?

A. Yes.

Q. No mortars falling in Dubai?

A. Right.

Q. That's time you recorded at Camp Al Asad; right?

A. That day, yes.

Q. It's 8-1/2 hours total that day at Camp Al Asad; correct?

A. Yes.

Q. And the next day eight hours again in Iraq. That's it. That's all that's recorded; correct?

A. Correct.

[238] Q. So only when you arrive at Camp Ar Ramadi, on January 21, 2005 do you begin to record

12 hours a day; is that correct?

A. That appears to be, yes.

Q. What was the state of KBR's ROWPU when you arrived at Camp Ar Ramadi?

A. It was idle.

Q. Was there a ROWPU unit physically present for KBR at Ar Ramadi when you arrived?

A. Yes.

Q. Was it functional?

A. No.

Q. Do you know why it was not?

A. No, not really.

Q. Do you know what the manufacturer of the ROWPU unit that was at Ar Ramadi when you arrived was?

A. Yes.

Q. What was it?

A. Water Works.

Q. Is it your testimony that the Water Works unit that ultimately was commissioned was present at [239] the time you arrived at Camp Ar Ramadi?

A. No. I think that would be assuming after I left that they didn't replace it with something, so I don't know.

Q. Do you know whether or not there was a Baskel unit that was also at Camp Ar Ramadi that was defective and was not operational?

A. No.

Q. Do you have any knowledge as to why KBR did

not have an operating ROWPU at Camp Ar Ramadi at the time you arrived there?

A. Because Walter Meyers was an idiot.

Q. That's the reason?

A. Uh-huh.

Q. Any other information you have other than your opinion that Walter Meyers was an idiot?

A. I think that's the only reason.

Q. Any equipment missing from that Water Works unit that would render it inoperable?

A. I don't believe so.

Q. Any chemicals or lab equipment that was on order that was necessary to operate the ROWPU that [240] weren't there yet?

A. That's true.

Q. Did that have anything to do with Walter Meyers being an idiot?

A. I believe so.

Q. Why is that, in your opinion?

A. He seemed to know where it was, but didn't seem to care to get it there.

Q. Where is it you believe it was?

A. In Kuwait.

Q. What is it you believe Mr. Meyers could have done and should have done to get it to Ar Ramadi?

A. I don't know. He was the ROWPU foreman, not me. I don't know.

Q. During the time you became acting ROWPU lead, when you were the ROWPU foreman, wasn't

there still missing equipment and chemicals --

MR. MAGNANINI: Objection.

BY MR. MARGOLIS:

Q. -- for the ROWPU unit?

[241] MR. MAGNANINI: Assumes facts not in evidence.

THE WITNESS: I don't recall if there were -- they arrived and I don't know what date I became acting ROWPU foreman and what date they arrived. I don't know if one was before the other.

BY MR. MARGOLIS:

Q. As between KBR and the military, do you know which party controlled the movement of equipment and supplies into Iraq?

A. I don't know that.

Q. You've never worked in logistics; right?

A. No.

Q. You have no idea whether or not there were difficulties in obtaining equipment and supplies that would have delayed the standup of KBR ROWPUs at Ar Ramadi?

MR. MAGNANINI: Objection.

THE WITNESS: I don't know.

BY MR. MARGOLIS:

[242] Q. Do you understand what I mean, the term standup, a ROWPU?

A. No.

Q. I just wanted to make sure you understood the question.

A. Stand up --

Q. Commission the ROWPU.

A. Oh, commission. I thought you said commission.

MR. MARGOLIS: Off the record.

(Discussion off the record.)

VIDEO OPERATOR: Back on the record at 4:27.

BY MR. MARGOLIS:

Q. With respect, then, to the question of commissioning the ROWPU, making it operational, is that a fair working definition of the term commissioning a ROWPU?

A. I believe that would be fair, yes.

Q. To do that, that requires chemicals to operate a ROWPU; correct?

A. Not necessarily. To start it up, you [243] wouldn't need chemicals. You could have run the ROWPU without any chemicals.

Q. Including chlorine?

A. Absolutely. Technically, you could run it.

Q. But would you consider that to be the proper commissioning of a ROWPU?

A. No.

MR. MAGNANINI: Objection; vague. You can answer.

BY MR. MARGOLIS:

Q. You would not; right?

A. Right.

Q. So to have a ROWPU that's properly commis-

sioned to provide potable water requires chemicals; correct?

A. Correct.

Q. Chemical coagulants; correct?

A. Possibly, depending on the water, the raw water being treated.

Q. What about the water that was coming from the Euphrates River?

[244] A. I never saw a raw water analysis.

Q. I assume you would agree with me water of higher quality may not require a coagulant. Is that what you're saying?

A. Exactly.

Q. The water in the Euphrates may have been a high enough quality that coagulants weren't required?

MR. MAGNANINI: Objection; mischaracterizes his testimony. You can answer.

THE WITNESS: On certain months of the year, that's possible, yes.

BY MR. MARGOLIS:

Q. How about the time you were there, from January to May of 2005?

A. I don't know. Without a water analysis, that's the only way to know.

Q. How about chlorine, we can agree you require chlorine to produce potable water for a ROWPU?

A. Yes.

[245] Q. Requires lab equipment and chemicals for testing; correct?

A. Yes.

Q. As between KBR and the military, do you know which of the two sets the priority for transporting items from Kuwait to Iraq?

MR. MAGNANINI: Objection; vague. You can answer.

THE WITNESS: I don't know.

BY MR. MARGOLIS:

Q. Do you know whether or not convoys were dependent to transport supplies and goods for base operations including Camp Ar Ramadi, whether convoys were dependent on military force protection?

A. I don't know what setup they had. I saw lots of trucks making deliveries there nearly every day. I don't know how they went about it. They seemed to arrive at night. That's all I know.

Q. You don't know who decides what gets on what convoy, then?

A. No.

Q. Camp Ar Ramadi was in a hot area, was it [246] not?

MR. MAGNANINI: Objection; vague.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. Do you have any difficulty understanding what I mean by "hot"?

A. No.

Q. Taking incoming fire; correct?

A. Yes.

Q. Mortar attacks?

A. Yes.

Q. Sniper attacks?

A. Yes.

Q. Dangerous place?

A. Yes.

Q. Do you know whether that would pose any logistical difficulties in getting equipment and supplies into Camp Ar Ramadi from Kuwait?

A. I don't know.

Q. Or from other bases in Iraq?

A. I don't.

[247] Q. No idea; right?

A. No idea.

Q. You mentioned that you worked in a carpentry shop during part of the time you were at Camp Ar Ramadi; is that right?

A. Yes.

Q. And that was in February of 2005?

A. Yes.

Q. You mentioned that you worked on, I believe, units to house audiovisual equipment for KBR employees; is that correct?

A. Yes.

Q. Anything else you worked on?

A. Yes.

Q. What else?

A. I think I recall building like a shoe rack for one employee who wanted his shoes up off the floor and just personal requests, primarily entertainment cen-

ters that went at the foot of the bed.

Q. Ever work on building any Iraqi coffins?

A. No.

[248] Q. How did these requests for personal items come into the carpentry shop?

MR. HOLMES: Objection.

THE WITNESS: Verbally.

BY MR. MARGOLIS:

Q. Didn't receive service request orders for those items?

MR. HOLMES: Objection; vague as to "items."

THE WITNESS: I don't recall that, no.

BY MR. MARGOLIS:

Q. During the time you were at the carpentry shop, were other carpenters working on any items for which service request orders had been submitted?

A. I believe so, yes.

Q. Were the other carpenters gainfully working, or was it just you that didn't have things to do?

MR. HOLMES: Objection; vague as to the characterization of "other carpenters."

THE WITNESS: I think his name is Tim [249] Richman -- close to that -- he seemed to stay really busy doing work order requests for desks, for the KBR offices. People would put in a work order for that or another instance, he made a bunch of bunk beds, the frames.

BY MR. MARGOLIS:

Q. Would you consider that to be valid work?

MR. HOLMES: Objection; legal conclusion.

THE WITNESS: I don't think it was for me to decide. I know he was working and he was busy doing that work.

BY MR. MARGOLIS:

Q. You thought that doing AV units for fellow KBR employees wasn't proper work; right?

MR. HOLMES: Objection; mischaracterizes his testimony.

BY MR. MARGOLIS:

Q. Did you have any problem with building AV units for other KBR employees or not?

MR. HOLMES: Objection; vague as to "problem."

[250] BY MR. MARGOLIS:

Q. You can answer the question.

A. I felt that building entertainment centers for KBR employees was an optional luxury for the KBR employee, and it had nothing to do with doing work for the military, so I had a problem with that.

Q. But you don't have a position as to whether building a desk for an office or building a bunk bed is okay or not?

A. I didn't know if perhaps KBR had that in their contract, so I couldn't make a moral decision on that. I didn't know.

Q. Do you know whether or not it's in the scope of work to build entertainment units?

A. To build what?

Q. To build entertainment units.

A. I assumed it is not.

Q. Isn't it true, sir, at the time you arrived at Camp Ar Ramadi not all of the equipment, putting aside chemicals for the moment, the equipment was there that would be required to properly operate the ROWPU?

[251] MR. HOLMES: Objection; vague as to "equipment" and vague as to "properly operate."

THE WITNESS: To the best of my knowledge, I believe everything was there. I believe it could have been operational the first week I arrived there.

BY MR. MARGOLIS:

Q. If Walter Meyers wasn't an idiot. Is that your testimony, sir?

A. Yeah.

(Defendant's Exhibit 53 identified.)

BY MR. MARGOLIS:

Q. Exhibit 53 before you, sir.

MR. HOLMES: Have you finished your review?

THE WITNESS: Yeah. I don't know what this is.

BY MR. MARGOLIS:

Q. It might help your review if you turn to the back and go forward, starting with page 2976.

Do you see an e-mail from a Josephine Hui to you dated March 6, 2005?

[252] A. I do.

Q. She has an e-mail address from Water Works; is that correct?

A. Yes.

Q. Water Works is the manufacturer of the ROWPU unit that KBR was to commission in Ar

Ramadi; is that correct?

A. Yes.

Q. Ms. Hui is asking you for a purchase order for a number of parts at Ar Ramadi; isn't that right?

A. Yes.

Q. Do you recognize what those parts are, sir?

A. Aside from the 25 liters of Glycerine, I don't know what that would be for, but yeah, I recognize all the rest.

Q. You recognize a "dosing pump installation kit"; correct?

A. I think I do, yes.

Q. "Top or bottom of a dosing pump"?

A. I would be making an assumption. I assume [253] parts for dosing pump, yes. I don't know specifically what it is.

Q. A dosing pump is necessary to properly operate a properly commissioned ROWPU, is it not?

A. Sure. They were already there.

Q. If they were already there, do you have any explanation why Josephine Hui is asking for a purchase order to ship these parts?

A. I don't.

Q. Didn't Water Works have to come out to inspect it and ensure it was properly installed before it could be commissioned?

A. I don't know. I don't know what the terms of their contract was.

Q. Do you recall Water Works personnel coming out to Ar Ramadi during the time frame in March

during the time frame you were getting ready to operate the ROWPU?

A. I do.

MR. HOLMES: Objection. Calls for testimony not in evidence.

BY MR. MARGOLIS:

[254] Q. You do recall that, sir?

A. I do recall them arriving.

Q. Did you see what they were doing?

A. A little bit. I didn't follow them around all day.

Q. Do you know why they were there?

A. I thought they were there to start up the ROWPU.

Q. You were the acting ROWPU leader at the time; right?

A. Really? I don't know.

Q. You don't know.

A. I don't know. March 6, does it say that I was then? I may have been in this time frame.

Q. So your testimony is this is equipment that Water Works is asking for a purchase order so they can ship to Camp Ar Ramadi was already there?

A. No, that's not correct. I'm saying that the dosing pumps in the ROWPU containers were already there. These appear to be additional parts to me, the installation kit, top and bottom of a dosing pump to me would probably be the check [255] valves.

Q. Is an installation kit typically just spare parts for a ROWPU?

A. For a dosing pump would be spare parts.

Q. An installation kit?

A. Yes.

Q. So this is a spare parts order?

A. It appears to me other than the 24-inch Ts, 24-inch elbows, those would have been used for the water distribution.

Q. How did you know that stuff was already there, these parts you're testifying were already there?

A. I'm not saying those parts were there.

I'm saying the chemical metering pumps were in the ROWPUs.

Q. You say the ROWPU had a dosing pump already. Is that what you're saying?

A. Several.

Q. How did you know they were there?

A. I saw them.

Q. You went out to the site and inventoried [256] the site; correct?

MR. HOLMES: Objection.

THE WITNESS: The first time Walter Meyers took me on the tour of Ar Ramadi and we walked through the ROWPUs, I saw them at that point, and then I saw them several other times when I walked into the ROWPUs, the Conexes is what they were in.

BY MR. MARGOLIS:

Q. You actually went into the Conexes and looked at them during this tour?

A. Yes.

Q. Turn to the second page of this exhibit. Here

again is a continuation of the e-mail about a PO for parts to Ar Ramadi, and the second e-mail is from Josephine Hui to you dated March 25, 2005?

A. Yes.

Q. Any reference to these parts being spare parts or unnecessary to operate the ROWPU?

MR. HOLMES: Take your time to read the e-mail.

THE WITNESS: I don't see it.

BY MR. MARGOLIS:

[257] Q. Brent and Bala, the names that appear in the latter part of this e-mail, those are Water Works employees; correct?

A. Correct.

Q. Those are employees whom you were scheduling to come to Camp Ar Ramadi to commission the ROWPU?

A. Yes.

Q. You state here that you would "expect to start laying out water bags at the end of this coming week." Do you see that?

A. No. Where is that at?

Q. After "MAYBE!" in the middle of the e-mail.

A. I see that, yes. What was your question?

Q. Wouldn't those water bags be necessary to collect potable water that's coming from the ROWPU once it was commissioned?

A. Yes.

Q. Were those water bags on site when you arrived, when you inspected the ROWPU in January 2005?

[258] A. Yes.

Q. You became the ROWPU acting lead, at least by virtue of your e-mail signatures -- you don't recall when you became the ROWPU acting lead; is that right?

MR. HOLMES: Objection; foundation as to the word "became." Vague as to the word "became."

BY MR. MARGOLIS:

Q. There came a point in time when you started to use the term acting ROWPU lead in your e-mails; correct?

A. Correct.

Q. Did you do that on your own, or were you told to do that by someone else?

A. I was told to do that, and it occurred the day Walter Meyers left on his R&R.

Q. Prior to that, you were working on tasks relating to commissioning the ROWPU; is that correct?

MR. HOLMES: Objection, vague as to "relating to."

THE WITNESS: Prior to that, I was working [259] on -- request you restate that.

BY MR. MARGOLIS:

Q. You are e-mailing with Water Works employees about parts that aren't at the site on March 6, 2005; right?

A. Right.

Q. Do you know why the water bags weren't laid out until March 20, 2005?

MR. HOLMES: Objection; assumes facts not in ev-

idence.

THE WITNESS: Walter Meyers is an idiot.

BY MR. MARGOLIS:

Q. Does this e-mail say the water bags weren't laid out yet as of March 20, 2005, sir?

A. It indicates that.

Q. Were they?

A. No, they weren't.

Q. Does this assume any fact not in evidence, sir?

A. I don't know what that means.

MR. HOLMES: Objection.

[260] BY MR. MARGOLIS:

Q. As of March 20, 2005 water bags weren't laid out; correct?

A. Correct.

Q. And the reason they weren't was because Walter Meyers was an idiot. Is that your testimony?

A. They couldn't be laid out because Walter Meyers had gravel put down, and I was told by Water Works I had to have that gravel removed before they could be placed, so I had to correct Walter Meyers's mistake and have topsoil brought in, so yes, that's why.

Q. Do you know why gravel was put down in the first place?

A. No.

Q. Does the installation of that equipment require a crane, sir?

A. No.

Q. There was no crane required to move any of the equipment necessary to commission the ROWPU?

MR. HOLMES: Objection; vague as to [261] necessary.

BY MR. MARGOLIS:

Q. Could you have gone out and lifted it up with your hands, Mr. Carter?

A. No.

Q. This stuff fills two Conexes; right?

A. It was already set. It was there before I got there. It was set.

Q. There was no need for a crane?

A. Not for that.

Q. How about anything relating to the ROWPU commissioning?

A. At one point I believe a crane was necessary based on what Walter Meyers told me.

Later, I found out that it wasn't necessary to place the foot valves, the suction lines into the river.

So the whole story of we need a crane before we can do anything was false. It wasn't needed.

Q. How did you find that out?

A. Once I went out to the river and saw that they could just be dropped into the river -- they -- I think I found out from somebody they didn't use [262] a crane. I know that.

Q. When you had to put in the soil, didn't that require heavy equipment?

MR. HOLMES: Objection.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. What kind of heavy equipment did that require?

A. A National Guard unit used their earth movers and dump trucks.

Q. Was there any delay in getting the use of the earth movers and dump trucks to move that soil?

A. No.

Q. You had no problem getting the military equipment to move the soil?

A. I asked them to do it and they were there the next day once I was in a position to be able to ask.

Q. Is it your testimony that once you became the ROWPU lead, there was nothing else that needed to be done or procured in order to commission the [263] ROWPU?

MR. HOLMES: Objection; vague as to "once you became."

THE WITNESS: That's not true.

BY MR. MARGOLIS:

Q. You said you could get the soil the next day; right?

A. They started on it the next day. First they had to remove all that gravel.

Q. How long did that take?

A. I don't recall. It was several days. I don't recall how many days exactly, but first -- it was a lot of gravel, like on an acre of gravel. I don't remember how long that took.

Q. What else had to be done?

A. Once the gravel was removed, then they had to bring in topsoil to set the bags at a certain elevation above the floor level of the ROWPU units, so they brought in lots and lots of dirt.

Q. How long did that take?

A. Days, days. I don't know. I don't [264] remember exactly how long it took. It was a lot of work.

Q. What else had to be done?

MR. HOLMES: Objection; vague as to what had to be done.

MR. MARGOLIS: We were talking about commissioning the ROWPU.

THE WITNESS: I don't know.

BY MR. MARGOLIS:

Q. You're the acting ROWPU lead; right? What else had to be done to set up the ROWPU?

A. I don't know. It wasn't my job.

Q. When you're the ROWPU acting lead, it wasn't your job to complete the commissioning of the ROWPU?

A. I don't believe so. I thought it was Water Works's job.

Q. So it was Water Works's job to get the ROWPU operational?

A. I believe that's the case.

Q. Do you know why on March 20 you're telling [265] them that you're trying to schedule a visit for three weeks out?

A. I believe that was in reference to prepping the site with the dirt.

Q. So it was going to take three more weeks to put the dirt on; is that right?

A. Possibly.

Q. Let me show you Exhibit 14, please. It's an e-mail to you from Walter Meyers copying Suzanne Raku Williams and Warren Smith. Do you see that?

A. Yes.

Q. "The MHE is delivering soft soil to the rowpu site all day today. They expect to complete by tomorrow." Do you see that?

A. I do.

Q. Is that wrong? Was it not, in fact, completed by March 23?

A. I don't know. I don't believe it was.

Q. Did it take three more weeks to do it?

A. No.

Q. Why--

A. This was March 22.

[266] Q. That's two days after you told the Water Works guys to be there three weeks from the 20th.

What else was going to take three weeks to do before the Water Works people could come to commission the ROWPU?

A. I don't know. They needed to install the suction lines into the river.

Q. I thought you could drop that into the water once you became aware of that?

A. Could have.

Q. Did you go out there and drop it in the water?

A. I didn't.

Q. Why not?

A. I think because that was D&P Construction's contract; wasn't mine. They were supposed to do it, I think.

Q. Didn't you see it as your job to try and get that KBR ROWPU operational as quickly as possible?

MR. HOLMES: Objection; form.

THE WITNESS: The last two weeks I [267] definitely overstepped my boundaries and did everything I possibly could to get pure water to Ar Ramadi.

BY MR. MARGOLIS:

Q. You're saying because it was D&P's job, couldn't get the pump stations in the water -- not the pumping station, but the intake in the water?

A. It was their job, to my understanding from Walter Meyers, yes.

Q. I guess I'm trying to understand why, if the soil was completed in and around March 22, it took so long?

A. I don't think it was completed. I think that's what they told me, and I was reporting that they expect to be complete by tomorrow, but I don't think that occurred.

Q. How long did it take?

A. I don't recall. It seemed like it took a week to me, but I don't remember exactly because I know they had to remove all the gravel first.

MR. MARGOLIS: Apparently we're out of tape so we need to take a break.

[268] VIDEO OPERATOR: Going off the record at

4:56.

(Recess.)

VIDEO OPERATOR: This is the beginning of tape 4 in the deposition of Benjamin Carter. We're restarting at 5:10.

BY MR. MARGOLIS:

Q. I wanted to go back and cover a topic I'm not sure we closed out earlier, Mr. Carter, and I expect we'll have some objections to this testimony. We need to go through it to for legal issues.

After the time you retained counsel, did you ever disclose to the government the allegation that you were directed by KBR to record 12 hours a day when you, in fact, did not work that time?

MR. HOLMES: Objection; vague. And I further instruct Mr. Carter not to answer the question as to time periods after February 1, 2006.

MR. MARGOLIS: Is that your instruction with respect to any communications he had with agents for the government from February 1, 2006 to the present with respect to the allegations in this [269] case?

MR. HOLMES: That's correct.

MR. MARGOLIS: You're not going to permit him to answer any questions in that regard?

MR. HOLMES: Craig, as you know, we had a discussion about the proffer earlier. The proffer did not result in an agreement between the parties, so you're correct. That is the instruction.

BY MR. MARGOLIS:

Q. Let me ask this question. At the time that you filed your Qui Tam action under seal, that was Feb-

ruary 2006; correct?

A. Yes.

Q. At that time, were you aware of a requirement to also submit a statement to the government of all material evidence in your possession relating to the allegations in the complaint?

MR. HOLMES: Objection. Calls for a legal conclusion.

THE WITNESS: I don't recall.

BY MR. MARGOLIS:

[270] Q. Are you familiar with the term "disclosure statement"?

A. I think I am, yeah.

Q. Did you review a disclosure statement that was submitted to the government?

MR. HOLMES: Instruct you not to answer.

MR. MARGOLIS: As to whether he even reviewed the disclosure statement?

MR. HOLMES: Yes.

BY MR. MARGOLIS:

Q. Do you know whether a disclosure statement was submitted on your behalf to the government?

MR. HOLMES: Instruct you not to answer.

BY MR. MARGOLIS:

Q. What allegations or evidence is included in a disclosure statement submitted to the government?

MR. HOLMES: Instruct you not to answer.

BY MR. MARGOLIS:

Q. Were you interviewed by agents from the gov-

ernment after your filing of your Qui Tam [271] complaint?

A. Yes.

Q. On how many occasions?

A. I don't recall how many.

Q. More than once?

A. I think so, but I don't specifically recall.

Q. Were you interviewed by any attorneys from the Department of Justice after the filing of your complaint?

A. I don't know.

Q. Do you remember a gentleman by the name of Abraham Meltzer?

A. Yes.

Q. Did he interview you?

A. I don't remember. I met him.

Q. Did you discuss the allegations in your complaint with Mr. Meltzer?

MR. HOLMES: Objection; instruct you not to answer.

MR. MARGOLIS: Grounds?

MR. HOLMES: Common interest privilege and [272] work product.

MR. MARGOLIS: You're claiming work product protection as to two statements Mr. Carter himself made as opposed to statements made by his counsel?

MR. HOLMES: Yes. The government was deciding whether to intervene.

BY MR. MARGOLIS:

Q. Mr. Carter, you would agree as a Qui Tam relator, someone who sues on behalf of the government in a False Claims Act, that you have an incentive for the government to intervene and take over the case; is that right?

MR. HOLMES: Objection; calls for a legal conclusion.

THE WITNESS: I think that is -- I don't know that for certain.

BY MR. MARGOLIS:

Q. Were you hoping the government was going to intervene and take over the case?

MR. HOLMES: Objection; relevance.

[273] THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. Were you disappointed when you found out that they didn't?

A. Yes.

Q. You're angry about the fact that they didn't?

MR. HOLMES: Same objection.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. One of the purposes of the disclosure statement is to essentially show what you've got to the government so they can make a decision to intervene; right?

MR. HOLMES: Objection; calls for a legal conclusion.

THE WITNESS: I don't know how they do their work.

BY MR. MARGOLIS:

Q. Do you think it was in your interest to hold anything back in terms of your communications [274] to the government with respect to whether the government should intervene in your case?

MR. HOLMES: Objection; calls for a legal conclusion.

THE WITNESS: I don't know.

BY MR. MARGOLIS:

Q. You don't know whether it would be in your interest to hold information back?

MR. HOLMES: Same objection.

THE WITNESS: I was just answering their questions. I don't know. I didn't intentionally hold anything back.

BY MR. MARGOLIS:

Q. At the time of the disclosure statement, that's an affirmative statement by you and your counsel to the government, right, not a question and answer?

MR. HOLMES: Objection; calls for a legal conclusion.

BY MR. MARGOLIS:

Q. Right?

[275] A. I don't understand the law enough to really answer that.

Q. Was this a question and answer statement when you made the disclosure statement or not?

MR. HOLMES: Instruct you not to answer.

BY MR. MARGOLIS:

Q. Do you know whether or not you or your counsel provided any information to the government after

February 2006 aside from interviews or meetings with government lawyers?

MR. HOLMES: Objection. It's very vague as to "information."

BY MR. MARGOLIS:

Q. Relating to the allegations in your case?

A. I think so, but I'm not certain. I think there was a second one. That's all I know, a second complaint. That's all I know. I don't know what it was exactly.

Q. Was there a second disclosure statement? MR. HOLMES: Objection. Instruct you not to answer, Ben.

[276] MR. MARGOLIS: As to whether there was a fact of a communication? I'm not talking about the substance. I'm talking about the fact. Are you instructing him not to answer as to the fact of the communication?

MR. HOLMES: Yes, as to your characterization of the term "disclosure statement." You have our privilege log, Craig.

MR. MARGOLIS: There's no communications with the government other than what's reflected on the privilege log? Is that your representation?

MR. HOLMES: We're not making a representation. You have our privilege log, which reflects documents in our possession notated as privileged in accordance with the Federal Rules of Civil Discovery--Civil Procedure.

MR. MARGOLIS: You're not willing to represent there are communications in your possession that aren't reflected on the privilege log?

MR. HOLMES: I think that's outside the scope.

[277] MR. MARGOLIS: Of what?

MR. HOLMES: Of your questions to Mr. Carter. We're in a colloquy now between you and I.

MR. MARGOLIS: It may be pretty relevant on Friday. If we have to be in front of the Judge and not saying we don't have information that the privilege log is complete, I need to know that and should probably be on the record.

MR. HOLMES: It reflects documents in our possession.

BY MR. MARGOLIS:

Q. Let's return to the topic we were just discussing before the break and let me mark, please, Exhibit 54. Defense Exhibit 54 is a series of e-mails between you and a KBR employee by the name of Dennis Chesson beginning -- all on March 24, 2005; is that correct?

A. Yes. This one is March 25.

Q. I'm sorry?

A. On the first page.

Q. I see there's a 6:20 a.m. e-mail from you [278] to Dennis Chesson at 6:20. His response shows up as March 24, 2005 at 10:27 p.m.

A. Right.

Q. Do you know where Dennis Chesson worked?

A. I don't.

Q. Did he work in Iraq?

A. Oh, yes.

Q. With the exception of that response on March

25 -- and I'm assuming you can't explain why he's responding on March 24 to an e-mail you sent according to this information on March 25?

A. Right.

Q. With the exception of that, all the e-mails shown as being sent or received on March 24, 2005; correct?

A. Correct.

Q. Dennis Chesson was a KBR employee who was one of the employees working in KBR responsible for commissioning ROWPU units throughout Iraq for KBR; correct?

A. I don't know.

Q. Do you know what his job was?

[279] A. No.

Q. So you're e-mailing with him about the setup of the ROWPU without knowing what his job was -- ROWPU Ar Ramadi without knowing what his job was?

A. I believe that's correct, yes.

Q. Starting at the last e-mail in the chain on March 24, 2005, there's an e-mail from Dennis Chesson to you?

MR. HOLMES: Which Bates page?

MR. MARGOLIS: REL 660.

BY MR. MARGOLIS:

Q. Asking for a series of questions about whether or not membranes for the second unit, have they been received. Do you see that question?

A. Yes, I see that.

Q. Did you understand membrane to be a reference to reverse osmosis membrane?

MR. HOLMES: Take the opportunity to read the e-mail before you answer.

THE WITNESS: Yes.

BY MR. MARGOLIS:

[280] Q. That's a necessary piece of equipment to run a ROWPU; right?

MR. HOLMES: Objection; vague as to that's.

MR. MARGOLIS: A membrane.

THE WITNESS: Yes. There was many membranes in each one, so I don't know how many he was referring to here.

BY MR. MARGOLIS:

Q. The next is a sentence, "Do you have a water source for the units yet?" Do you understand that he was asking you there?

A. Where is this at?

Q. On REL 660, the second question.

A. I understand that.

Q. That's the water source to be able to provide water to the ROWPUs for operation; correct?

A. Correct.

Q. Then the next question is, "And did you receive a package from DHL form Water Works?" Do you see that?

[281] A. Yes.

Q. Do you know what package it is he was referring to?

A. I don't recall.

Q. If you look at your answer -- by the way, see your e-mail doesn't start here by asking Mr. Chesson who he is and why is he asking you these questions; right?

MR. HOLMES: Let's give him an opportunity to read the e-mail.

THE WITNESS: It appears to me this isn't the entire string of communication between he and I.

BY MR. MARGOLIS:

Q. You replied to the e-mail, according to your computer, seven minutes later; isn't that right?

A. Where do you see that?

Q. His e-mail to you is Thursday March 25, 2005 at 10:08 a.m.?

A. Yes.

Q. Your response is March 24, 2005 at 10:15 a.m.

[282] A. Right.

Q. Isn't that seven minutes after he sent his e-mail to you, sir?

A. Yes. What I'm saying is I think he sent me an e-mail before this set of e-mails. I don't think this was my initial communication with him is what I'm saying.

Q. My point being at least at some point you knew who Dennis Chesson was and what his job was?

A. Yes, by his title on the e-mail.

Q. Do you have an understanding as you sit here today what the Theater Manager for CLSS, Water Technical Support Team's job was?

A. No.

Q. But at the time you sent this e-mail you did know what his job was?

A. No, I didn't. I still don't know what his job was.

Q. You're just responding to his questions without knowing who he is or what his job was. Is that your testimony?

A. Correct.

[283] Q. You appear at the time to have known what DHL shipment he was talking about because after saying that we have the membrane -- you say "I cannot locate the DHL shipment anywhere, and believe me I've tried every resource I can imagine."

MR. HOLMES: Which Bates page is that?

MR. MARGOLIS: 659.

BY MR. MARGOLIS:

Q. Does that refresh your recollection as to which DHL package we're talking about?

A. No.

Q. Can you turn back to Exhibit 53.

A. Right. Anyway, I don't think that's the same package.

Q. Let's look at Exhibit 53, please, Mr. Carter. I'm going to ask you to turn to page 2974 of that document. Do you see in the middle that e-mail chain we discussed earlier is an e-mail from Josephine Hui at Water Works to you, Ben Carter, on March 20, 2005 saying "Hi Ben, Thanks for checking the PO and I have checked with DHL that the [284] package had been delivered to Ramadi on the 12th March 2005 and it was received by 'Richard.'"

Do you think you know Richard?

MR. HOLMES: What was the question? I'm sorry.

MR. MARGOLIS: I was just reading the e-mail.

BY MR. MARGOLIS:

Q. Are you saying that's a different DHL package you were looking for and could not find as of March 24, 2005?

A. I think so.

Q. Based on what?

A. Based on I recall Walter Meyers telling me to pursue a couple purchase orders, but I didn't know anything about how the system worked. I didn't know who to contact, so there was confusion for me on what these DHL packages were so I don't know.

Q. You don't know or you don't think it's the one that was reflected in Exhibit 53?

A. I don't think it was the one. This one they said we had it, but apparently we didn't.

[285] Q. You said you looked for it everywhere, but couldn't find it. Isn't that what you tell Dennis Chesson on March 24, 2005, sir?

A. Yes.

Q. So you don't think it's that one, but you don't know which one it was?

A. I was confused. There was several of them.

Q. What other ones were you expecting they needed to receive in order to have the ROWPU operational?

MR. HOLMES: Objection; assumes facts not in evidence.

THE WITNESS: I was just being a secretary for Water Works.

BY MR. MARGOLIS:

Q. You're the acting ROWPU lead at this point, are you not, Mr. Carter?

MR. HOLMES: Objection; assumes facts not in evidence.

BY MR. MARGOLIS:

Q. Were you the acting ROWPU lead as of March [286] 24, 2005?

A. I believe so.

Q. Was Mr. Meyers on R&R at this time?

A. I believe so, yes.

Q. You were a little more than a secretary, weren't you, at this time frame, Mr. Carter?

MR. HOLMES: Objection.

THE WITNESS: I wasn't aware of the prior dealings with Water Works and Walter Meyers, so I didn't know what they needed for these repair -- I didn't know anything. I wasn't told anything.

BY MR. MARGOLIS:

Q. You just testified that all the equipment was on site necessary and supplies and materials were on site to commission the ROWPU; isn't that right?

A. I could have got it started up had I had the authority.

Q. Here you're e-mailing Dennis Chesson looking for a DHL shipment that you don't know what it contains?

[287] A. I believe that's true.

Q. And you don't know whether or not this was equipment necessary to commission that ROWPU?

A. I guess I didn't. I don't know.

Q. Let's look at the next sentence you wrote. "I've contacted Water Works personnel to have them bring another set of the same parts with them. I believe that is now taken care of."

Do you see that, sir?

A. Yes.

Q. Why would Water Works have to bring a second set of parts that weren't necessary to commission the ROWPU when they came to Iraq?

MR. HOLMES: Objection as to the word "necessary."

THE WITNESS: I don't know what they needed to do their job.

BY MR. MARGOLIS:

Q. Why did you ask them to bring a second set of parts, then?

A. Because someone told me to.

Q. Who?

[288] A. I think it was Walter Meyers or maybe this Dennis Chesson. I didn't even know what it was.

Q. But you're the ROWPU lead. You're the ROWPU expert at this time at Ar Ramadi; right?

MR. HOLMES: Objection to "ROWPU expert."

THE WITNESS: I had been spending my time doing nothing.

BY MR. MARGOLIS:

Q. Are you an expert on ROWPU, sir?

A. Yeah. That's why I could have started it up in a week. With what was there, I could have done it. I had the military offer me chlorine. It could have been done and it wasn't done because Walter Meyers seemed to be incompetent. I kind of regret saying he was an idiot, but he seemed to me to be incompetent. He didn't understand water purification. So it could have been started had the desire been there to start it.

Q. Do you know how many years Walter Meyers had experience with the Navy in water purification, sir?

A. Yes.

[289] Q. How many?

A. I think he told me 20, 20 something like that, just turning valves.

Q. That's what he told you, just turning valves?

A. Uh-huh.

Q. You wrote an e-mail here on March 24 assuring Dennis Chesson you've looked for the DHL shipment. You told Water Works to bring another set of the parts, but you don't know what the parts were?

A. Correct.

Q. Your testimony is they weren't necessary to operate the ROWPU?

A. I'm not saying that. I'm saying I don't know what they were. I'm saying that this shipping list here to me does not appear to be anything that would prevent it from running.

Q. You said that's a different shipment; right? This DHL package is something different?

A. I don't know.

Q. Then Dennis Chesson e-mails you in the [290] next e-mail "When do you expect a crane?"

Do you see that?

A. Yes.

Q. And your answer to him on March 21, '05 "I was told by logistics it would be here by this weekend. But...who really knows." Do you know what this crane is for?

MR. HOLMES: Which page are we on, Craig?

MR. MARGOLIS: 658.

MR. HOLMES: Be sure to read the preceding and succeeding e-mails, Ben.

THE WITNESS: The crane was to be used to put the foot valves into the river.

BY MR. MARGOLIS:

Q. This was a crane that was unnecessary?

A. Yes.

Q. As of March 24 when you were the acting ROWPU lead, you're telling Dennis Chesson essentially you're waiting on the crane to be able to complete the work.

MR. HOLMES: I couldn't hear the question.

[291] BY MR. MARGOLIS:

Q. Did you understand it?

A. I did.

Q. Do you need it read back?

MR. HOLMES: It was kind of low.

MR. MARGOLIS: Julie, could you read it back,

please.

(The reporter read the record as requested.)

MR. HOLMES: Objection. Calls for facts not in evidence.

THE WITNESS: What was the crane for?

BY MR. MARGOLIS:

Q. You already testified you thought the crane was for installing foot valves; right?

A. Right.

Q. Then you later on said you didn't need the crane; right?

A. I later on found out they didn't need the crane. They didn't use a crane to install the foot valves. It was unnecessary. I went along with this because Walter Meyers told me we can't get this [292] thing going because we don't have a crane. That was his excuse in January, so I believed him.

Q. He's not there now; right?

A. Right.

Q. And you're there?

A. Right.

Q. If the crane wasn't necessary, why are you telling Dennis Chesson you need to wait for it?

A. Because at that time I still believed it was necessary to install those in the river because that's what I had been told, that D&P, the contractor, needed the crane so they could complete their job of installing those in the river.

Q. Based on your own experience with ROWPUs, you weren't able to form a judgment as to whether or

not foot valves needed to be moved by a crane?

A. I didn't have that authority. In my experience, I would have got it done, yes, but I didn't have the authority. That was a separate contract with D&P.

Q. Even as the acting ROWPU lead, your testimony is you didn't have that authority; is that [293] right?

A. I don't believe I did.

Q. Then on the top e-mail--

MR. HOLMES: Which page?

MR. MARGOLIS: 658, on the top, on March 25.

BY MR. MARGOLIS:

Q. You're e-mailing Dennis Chesson a quick update, "I've been informed that we have no single rooms at the inn." Is that a reference to housing at Ar Ramadi?

A. Yes.

Q. "We have a visiting QA/QC guy here along with others. Water Works has written me back and they won't be here until April 3rd. You should try to wait at least another week"; is that correct?

A. Yes.

Q. You're telling Dennis Chesson to hold off until he comes to Ar Ramadi for the ROWPU; right?

MR. HOLMES: Objection.

THE WITNESS: Yes.

BY MR. MARGOLIS:

[294] Q. Because you have to wait for Water Works; right?

A. Yes.

Q. His reply to you on the next page is "That's probable a blessing in disguise since I was bumped from the flight about 20 minutes ago. Ben I need for you to inform me of when you will have crane support, I don't wait for Water Works to arrive at the camps. We will stuff the membranes and repair all the things wrong with the units prior to those guys coming forward to your site. Water Works works for me in the commissioning of these units."

Did you still believe after receiving that e-mail that you had to wait for Water Works in order to be able to commission the ROWPU?

MR. HOLMES: Objection.

BY MR. MARGOLIS:

Q. You can answer.

A. I believed that he told me to let him know when we have a crane, and I said I will let you know when we have a crane.

[295] Q. Didn't you testify earlier that it was Water Works's job to commission the ROWPU?

A. That's what I thought, yes.

Q. And Dennis Chesson is saying don't wait for Water Works; right?

A. He's saying don't wait for Water Works.

We can stuff the membranes and repair the things wrong with the units.

Q. Was there anything wrong with the units?

A. To my knowledge, there wasn't, no.

Q. You didn't reply to him and say well, there's nothing wrong with the units?

A. I didn't know what he was talking about.

Q. You're the one on the site, Mr. Carter, not Mr. Chesson.

A. That's where -- it's obvious in here I keep telling him there's no reason for you to show up, there's nothing for you to do.

Q. Why didn't you e-mail Mr. Chesson and tell him there's no need to make repairs on the ROWPU units?

MR. HOLMES: Objection; argumentative.

[296] THE WITNESS: I assume maybe he knew something that I didn't know.

BY MR. MARGOLIS:

Q. You're continuing to tell him about "The moment I get definite movement with the crane I will contact you"; right?

A. Right.

Q. That's the same crane that was not necessary to install the ROWPU -- excuse me, the foot pumps to the ROWPU?

A. Right.

Q. The same crane that was not necessary to install the foot valves for the ROWPU; right?

A. Right.

Q. Mr. Meyers put you up for promotion; isn't that right?

MR. HOLMES: Objection; vague as to "put you up."

BY MR. MARGOLIS:

Q. Did Mr. Meyers recommend you for a promotion, sir?

A. I believe so. I never saw any papers. I [297] think he did.

(Defendant's Exhibit 55 identified.)

BY MR. MARGOLIS:

Q. Do you recognize what I placed before you as Exhibit 55?

MR. HOLMES: Take an opportunity to read it.

THE WITNESS: I've never seen it.

BY MR. MARGOLIS:

Q. Let me ask you questions about some of the things that are represented in here. This isn't dated, but at the time it was written, it states "He," and the prior sentence you agree is a reference to you, Ben; correct?

A. Correct.

Q. "He has been put in place as a lead for the water plant for the past 45 day form the time he been there he has worked with water works for five days at B-4 and in inventorying all the equipment to ensure the plant is able to maintain two day of water on the ground."

Did you do that work?

[298] MR. HOLMES: Objection, "that work."

MR. MARGOLIS: The sentence I just described.

MR. HOLMES: I don't know if it's a sentence. It's a run-on.

THE WITNESS: I don't remember that.

BY MR. MARGOLIS:

Q. Aside from the grammatical commentary --

A. This paper needs some work.

Q. Did you do the work or not which he can check?

A. I don't believe I was a lead in the water plant for the past 45 days. I think I was only the lead for a couple weeks.

Q. Did you work with five days with Water Works at B-4?

A. I don't think so.

Q. Did you inventory the equipment to be sure the ROWPU plant was able to maintain two days of water on the ground?

A. I don't remember doing that, no. I don't even know what he means by that, maintain two days [299] of water.

Q. Who's "he"?

A. I don't know. I don't even know who wrote it. I'm assuming it's Walter Meyers with the spelling.

Q. And Walter Meyers is the person who put you up for promotion, recommended you for promotion; correct?

A. I believe so. I'm not sure.

Q. Did you not identify all equipment and material that is needed and placed on order relating to the ROWPU?

MR. HOLMES: Objection as to "placed on order," vague.

THE WITNESS: I don't recall placing any order.

BY MR. MARGOLIS:

Q. Did you ensure that three generators were hooked up to power the two ROWPUs in its -- on site?

MR. HOLMES: Objection. That seems to restate

what's in the document.

MR. MARGOLIS: I'm just asking him a [300] question, Mr. Holmes.

BY MR. MARGOLIS:

Q. Did you ensure --

A. Yes.

Q. That's work you did?

A. I asked the generator guys to bring the generators out, yes, I did that.

Q. Did you lay out plans for the generator and power connection?

MR. HOLMES: Objection as to "plans."

THE WITNESS: I don't know what that means.

MR. HOLMES: Vague.

BY MR. MARGOLIS:

Q. Did you ensure the connections and hoses had been laid out for connection for the ROWPU to the piping system?

A. No.

Q. Did you ensure that the ROWPU had restriction signs posted to limit access to the site?

MR. HOLMES: Objection. The document [301] doesn't say to the site.

MR. MARGOLIS: I'm just asking him a question, Mr. Holmes.

THE WITNESS: I did, yes.

BY MR. MARGOLIS:

Q. Did you ensure there was proper distribution towers for water from the ROWPU to fill water trucks?

A. No.

Q. Did you ensure that the subcontractor was performing requirements to enable the ROWPU site to run?

MR. HOLMES: Objection to note that counsel has restated the document.

MR. MARGOLIS: I'm asking a question. I'm going to ask you to stop making those objections or I'll guarantee you we're going to be in front of a judge asking for more time. I'm not referring to a document. I'm asking a question.

MR. HOLMES: You're looking down at a document.

MR. MARGOLIS: I can look at whatever [302] notes I choose to, Mr. Holmes. I'm going to ask you to stop making those objections, or I guarantee you I will be back in front of a court asking for more time.

MR. HOLMES: Your statement is noted.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. You did not do that?

A. No.

Q. Did you train ROWPU personnel to ensure they understood KBR's SOP for water operations?

A. No.

Q. If Walter Meyers, as you assume, is the author of this document, do you have any idea how he would have gained any of those impressions?

MR. HOLMES: Objection; calls for compound speculation.

THE WITNESS: I would be speculating absolutely. I don't.

BY MR. MARGOLIS:

Q. Don't have any idea?

[303] A. No.

Q. You're saying with the exception of a couple items, you didn't do any of these things. Is that what you're saying?

A. I'm saying as this is worded, I did not do what these words say I did. The date would be really helpful when he actually produced this. I suspect it was months after I left.

Q. Did you do anything to get water distribution towers built?

A. Yes.

Q. What did you do?

A. I put in a work order with the carpenters to build, I think, three water towers.

Q. Is that it?

A. Yes.

Q. Did you inspect the water towers after they were built?

A. I don't recall doing that, no.

Q. Do you recall a time when a lab Conex arrived on the site for the ROWPU?

[304] A. Yes, I do.

Q. Do you recall having e-mail communications with William Granger with respect to that lab when it arrived or prior to its arrival, I should say?

A. I think I do, but I don't think it was about the lab.

Q. What did you think it was about?

A. I think it was about attending his laboratory tech training course in Baghdad.

Q. You had to postpone that a few times because you were too busy; right?

A. I was denied-- I was told I couldn't go, and I described it a different way.

Q. By who were you told you couldn't go?

A. Tom Smith -- Warren Smith.

Q. Did he tell you why you couldn't go?

A. I don't recall. Terrence Copling later told me to ignore that and go.

Q. That's the reason you're saying you said you couldn't attend?

A. Right.

Q. When you look at Defense Exhibit 14 --

MR. HOLMES: Give us a minute, Craig.

[305] BY MR. MARGOLIS:

Q. In the last sentence you say "I cancelled my planned water lab tech training in Baghdad until further notice, due to increased workload presently." That's an e-mail you sent to Walter Meyers on March 22, 2005; is that right?

A. Yes.

Q. And you copy both Suzanne Raku-Williams who was the camp manager for KBR; right?

A. Yes.

Q. And Warren Smith; right?

A. Yes.

Q. And that's a lie?

MR. HOLMES: Objection; mischaracterizes.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. You just said that you couldn't go to the lab training because Warren Smith told you you couldn't go, and you came up with other ways of phrasing it; is that right?

MR. HOLMES: Objection; mischaracterizes [306] it.

BY MR. MARGOLIS:

Q. Were you or were you not unable to attend the planned water lab tech training until further notice because of your increased workload as of March 22, 2005?

A. That's not the reason I didn't go.

Q. When you say "due to increased workload presently," that's just not true. Is that it?

A. No, that's not not true. I was sending this also to Warren Smith, and I'm not going to write in there "because Warren said I couldn't go."

Q. Why didn't you go to Suzanne Raku-Williams and ask her why you couldn't go?

A. I didn't have a relationship with Suzanne Raku-Williams. I rarely talked to her. She was rarely

available, so Warren Smith was in the chain of command. My chain of command I understood was Walter Meyers, Warren Smith.

Q. Were you involved in unpacking, unfurling, and positioning nine 50,000 gallon water bladders in late March 2005?

[307] A. Yes.

Q. Did that require the work of other employees from KBR trades to complete?

MR. HOLMES: Objection; vague as to "KBR trades."

THE WITNESS: I got volunteers, and Wackenhut firefighters helped, and a number of KBR employees came over to help, too.

BY MR. MARGOLIS:

Q. How long did that job take?

A. I don't recall exactly. I don't know if it took more than a day or not.

Q. I want to return for a moment to your time sheets, Mr. Carter. You previously testified that you were directed to record 12 hours a week whether or not you actually worked 12 hours -- I'm sorry. I said a week. I should have said a day. Let me scratch that.

You were directed to record 12 hours a day on a time card regardless of whether you worked 12 hours in that day; is that right?

[308] A. Yes.

Q. And that's what you did, in fact, correct?

A. Yes.

Q. Starting with Bates number 1195, you see there on February 16th of 2005 you recorded 13 hours. Do you see that, sir?

A. Yes.

Q. You have a notation there "1 HOUR DRAFTING WATER TOWERS AND GENERATOR BASE PATHS"?

A. That's correct. That's what it says.

Q. On February 16, 2005, were you required to work an extra hour to do that additional work?

A. Yes. Walter told me to do this after 7:00, and he authorized that, so that's why I did it.

Q. So you're saying because you had to do that work outside of the usual work hours, you recorded the extra hour and not that you actually had 13 hours' worth of productive work to do on February 15, 2005?

A. I'd say that's essentially correct, yes.

I specifically remember Walter Meyers telling me to [309] draft that up and produce a work order, and it was after 7:00 so he told me to add an hour, so I did.

Q. You would agree that's work related to the commissioning and setup of a ROWPU unit; is that right?

MR. HOLMES: Objection; vague as to "related to."

THE WITNESS: I suppose it was necessary that the towers were needed, yes. It was general contracting work, which I've never claimed to be a general contractor, so yeah.

BY MR. MARGOLIS:

Q. Did you think you weren't qualified to do that work?

A. I didn't really feel qualified to design the water towers because I didn't know how much weight they could be hold. There would be people walking on them and stuff. So no, I definitely wasn't qualified to do it, but I did my best.

Q. Did you tell Walter Meyers you weren't qualified to do it?

[310] A. I don't know if I did or not.

Q. Turn to the next page, please.

A. 1196? Is that the right page?

Q. That's correct. On this time sheet you have 13-1/2 hours recorded on February 20, 2005 and the notation "CRANE SCHEDULED TO BE AT ROWPU SITE"

February 20, 2005. What's your explanation for why you recorded 13-1/2 hours on that day?

A. I don't recall.

Q. That's not an indication -- that means you had more work than you could have done during your 12-hour day.

MR. HOLMES: Objection.

THE WITNESS: No, it's not.

BY MR. MARGOLIS:

Q. You understood my question, I assume?

A. Yes.

Q. It's not?

A. Right.

Q. But you have no explanation for why you put down an extra hour and a half that day?

[311] A. I would like to explain in terms of I don't know that that specifically is related to that day because I have three entries here on the 20th.

Q. The next one says "1 hour 02-23-05."

A. I don't know what it says.

Q. "MANAGEMENT INFORMS."

A. I don't know.

Q. So no explanation?

A. Other than Walter Meyers told me what to write down.

Q. Do you recall that, sir, or are you guessing?

A. I recall that.

Q. So now you recall versus I don't know.

Now you recall Mr. Meyers told you to do it?

A. Walter signed off on every one of my time sheets.

Q. I'm asking you, do you have a specific recollection that Mr. Meyers instructed you to write down 13-1/2 hours on February 20, 2005?

A. I don't have specific memory of that day of him telling me that. I know he told me he was a [312] ROWPU foreman. He told me you can have an extra hour today because of that.

Q. Did you also take extra hours when he asked you to -- or authorized it?

A. Yes.

MR. HOLMES: Objection.

BY MR. MARGOLIS:

Q. Without exception, is that right, sir?

MR. HOLMES: Which question is pending?

MR. MARGOLIS: The last question was --

THE WITNESS: Without exception --

BY MR. MARGOLIS:

Q. Did you always write down the extra hours when he authorized you to do it?

MR. HOLMES: Objection; vague as to "authorized."

THE WITNESS: I believe so. There was only one time I had a disagreement on bunker time, but yes. I did what Walter told me to do. He was my boss.

[313] BY MR. MARGOLIS:

Q. On Wednesday, February 23, 2005, we have a notation -- first of all, you recorded 13 hours that day; right?

A. Yes.

MR. HOLMES: Are we still on the same Bates page?

MR. MARGOLIS: Yes, February 23, 2005.

You wrote down 13 hours.

THE WITNESS: Correct.

BY MR. MARGOLIS:

Q. And you have "1 HOUR," February 23, 2005 "MANAGEMENT FORMS"; right?

A. What is this, "MANAGEMENT" what?

Q. I believe it says "MANAGEMENT" and I believe that says "FORMS." That's your handwriting?

A. Yes, it is. I don't know what it says, though.

Q. Do you know why you put down 13 hours that day, sir?

A. "MANAGEMENT FORMS" -- I don't.

[314] Q. Then on February 25, 2005, you write down "BUNKER TIME" where you recorded 12-1/2 hours; is that right?

A. Correct.

Q. You see here on February 28, 2005 there was a 12 struck through and a 13 with your initials on it. Do you see that?

A. I'm sorry.

Q. I'm sorry. I moved to page 1197, my mistake.

A. Yes, I see that.

Q. Do you know why you did that?

A. No, I don't. If I could read what that said, that would be why I did it.

Q. Unfortunately, that's the best copy we have. Do you see you recorded 13 hours on -- March 3rd of 2005 on that day; right?

A. Yes.

Q. And there's a notation underneath, again somewhat difficult to read, but it appears to say" 1 HOUR LAB/OFFICE WORK" March 3, 2005. Do you see that?

[315] A. Yes.

Q. Did you do an additional hour of lab and office work on March 3, 2005 that you weren't unable to do in your 12-hour day?

MR. HOLMES: Objection as to the use of the word

"additional." Assumes facts not in evidence.

THE WITNESS: I don't know. I don't recall.

BY MR. MARGOLIS:

Q. Do you know how many hours you worked on March 1, 2005?

A. Well, it says I worked 13 hours.

Q. Did you work 13 hours?

A. I'm sure I didn't.

Q. Why are you recording an extra hour -- your instructions were to record 12 hours whether you worked it or not. Why are you recording an extra hour?

A. So KBR could bill the government more money.

Q. That was your intention.

[316] A. No. But that's KBR's intention.

Q. Aside from the commentary, sir, why did you write 13 hours? Were you instructed to do it?

A. Walter Meyers.

Q. Because whenever he instructed you to write down additional time, you did it; right?

A. Absolutely.

Q. And not without exception?

A. I believe that's without exception, yes.

Q. How many hours did you record on -- let's turn forward a little bit to page 1199. On Thursday March 17, 2005, how many hours did you record?

A. 12. I believe that's what that says.

(6:00 p.m.)

Q. It's your handwriting; right?

A. Yes.

Q. I'm going to show you what's been previously marked as Defense Exhibit 5. Turn to the second page, please, and look at the first e-mail on the chain.

A. Let me read this. Okay. Now I've read it.

[317] Q. You're indicating on March 17, 2005 that you and Dale will have to work late that night; is that right?

A. Yes.

Q. Now, do you recall that you had other work that you were doing on March 17th that was going to require you to work late?

MR. HOLMES: Objection as to "other work." It's vague.

THE WITNESS: I recall this particular incident and this developed because the chlorine in the 55-gallon drums was about to explode and so I had to work late that might to prevent it from exploding.

BY MR. MARGOLIS:

Q. So you did have to work late that night and you asked approval to work late that night; right?

MR. HOLMES: Objection.

THE WITNESS: Not really. I was telling him what I was doing.

[318] BY MR. MARGOLIS:

Q. You weren't asking for his approval?

A. No.

Q. He gave it to you, though, didn't he?

MR. HOLMES: Objection.

BY MR. MARGOLIS:

Q. On the next e-mail on March 17, 2005, 3:29 p.m. Walter Meyers e-mails you and says "I understand that you be work late and that is fine do not work more than 16 hr." Do you see that?

A. I do.

Q. How many hours did you record on your time sheet that day, sir?

A. 13, I believe. Is that correct?

Q. It's 12, if you look at March 17, 2005.

A. I wrote 12?

Q. Look at your time sheet.

A. I see I have 12 written down.

Q. You were authorized by Walter Meyers --

A. To go 16.

[319] Q. Without exception you did whatever he told you to?

A. I did. I must have forgotten that hour and got screwed, really.

Q. Because it would have been more money in your pocket, Mr. Carter, if you would record four more hours. That's how you got screwed; right?

A. No.

MR. HOLMES: Objection; argumentative.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. That was four more hours of overtime you could have recorded and been paid for; right?

A. I could have and didn't.

Q. But you did whatever Mr. Meyers told you to

do in terms of recording time; right?

MR. HOLMES: Objection; mischaracterizes the testimony.

THE WITNESS: I did it when he was there in the O&M office at the time I was signing my time sheet. This is an isolated incident.

[320] BY MR. MARGOLIS:

Q. Did you want the ROWPU foreman job?

A. Yes.

Q. When you became the acting ROWPU lead, what is it you understood your job was?

MR. MAGNANINI: Objection; vague.

Craig, I'll pick back up.

MR. MARGOLIS: Okay.

THE WITNESS: I didn't really know honestly because I don't know what acting ROWPU lead is. That's not an acting ROWPU foreman, and it wasn't an acting ROWPU supervisor, so I didn't even know what that title meant.

BY MR. MARGOLIS:

Q. Did you ask anybody?

A. No.

Q. But you took on the position; right?

A. Yes. I was under the understanding it was temporary while Walter was gone.

Q. There's an allegation in this case that you were unable to test water -- I should ask a [321] predicate question.

At the time you were at Ar Ramadi, water that was being produced by a ROWPU at the base was be-

ing produced by the military ROWPU; is that correct?

A. Correct.

Q. There's an allegation in this case you were unable to test water being produced by the military ROWPU because of an absence of testing equipment; is that correct?

A. Yes.

Q. And that testing equipment only became available after you told Suzanne Raku-Williams that it needed to be ordered. Did that happen?

A. Yes.

Q. When did you have that conversation with Suzanne Raku-Williams?

A. I don't recall. It would have been at the time that Ms. Dee, the woman who was in charge of the DFAC, informed me that they were required to test the water at the KBR DFAC.

So I said well, we've got to have a [322] spectrophotometer to test it, so I went to Suzanne and told her that. I don't know the timing of it.

Q. Do you know whether spectrometers had been ordered prior to that time?

A. I was told they were, yes.

Q. Who told you that?

A. Walter Meyers.

Q. Is a colorimeter another name for a spectrometer?

A. No.

Q. It's a different instrument?

A. I believe so, yes. I believe it's a manual light

comparison wheel versus a spectrophotometer -- I don't know how to describe it -- electronic device -- it's not -- it's not so subjective as a colorimeter where you can kind of guess with your eyes how close it is.

Q. Did Walter Meyers tell you if the spectrometer had been previously ordered and had not arrived at the camp at the time you requested it?

A. I don't recall why -- I don't remember exactly.

[323] Q. Do you have any reason to doubt what he told you, that it had been previously ordered?

A. At that time, I didn't. This was in the first few days that I was there. As time went on, I began to question many of the things he told me.

Q. But aside from that, aside from having general concerns, I hear what you're saying in terms of Mr. Meyers's capability, do you have any other reason to doubt that he had told you about whether spectrometers had been previously ordered?

A. I questioned his credibility. He bragged a lot, so I don't know what he did, what he didn't do, what he said. It was hard to know.

Q. What did he brag about?

A. I don't know. Himself.

Q. How was he bragging?

A. I don't know how to describe that.

Q. You said he bragged a lot. I'm asking you what he did.

A. He just talked a lot.

Q. He was a talkative guy?

A. Very.

[324] Q. Very chatty?

A. Yes.

Q. I'm going to show you what's been marked as Defense 10. Do you recognize that?

MR. MAGNANINI: Get your glasses.

MR. MARGOLIS: Yeah. It's a little hard to read.

THE WITNESS: I wish I could read the dates on here to confirm if I recognize it or not.

I definitely wouldn't recognize the back page because I wasn't there at that time.

BY MR. MARGOLIS:

Q. Do you see the dates at the bottom on the left-hand side, March 19, '05, March 20, '05 on the left-hand side?

MR. MAGNANINI: In the first column.

THE WITNESS: Is that what that says?

MR. MARGOLIS:

BY MR. MARGOLIS:

Q. I'm asking you. If you can't read it, that's fine.

A. I don't know.

[325] Q. Is that your handwriting in the numbers, can you tell?

A. I can't really positively say.

Q. Did you do chlorine testing in March of 2005 at the DFAC?

A. Yes.

Q. When did you start doing that?

A. When I got the spectrophotometers.

Q. Do you recall when you got those?

A. It would have been the day before this first day so whenever that was.

Q. Do you know if there was any other KBR employee who was doing chlorine testing aside from yourself at the DFAC during the time you were there?

A. Yes.

Q. Who?

A. Dale Lehew.

Q. Did you prepare a document called a water tracking report that was sent to KBR managers with respect to the status of the commissioning of the KBR ROWPU at Ar Ramadi?

A. I don't recall if I did or not.

[326] MR. MARGOLIS: Can we take a break for a little bit?

MR. MAGNANINI: Sure. It's been an hour. VIDEO OPERATOR: Going off the record at 6:14.

(Recess.)

VIDEO OPERATOR: Back on the record at 6:42.

BY MR. MARGOLIS:

Q. Before our break, Mr. Carter, I had asked you a question about water tracking reports. I put before you what's been previously marked as Defense 15, an e-mail from you to several KBR employees, including Walter Meyers with an attachment and includes information on ROWPU reports. Including one relating to Ar Ramadi.

Do you recall sending these ROWPU reports, water tracking reports?

MR. MAGNANINI: Craig, is the second page --

MR. MARGOLIS: The second page where it says "Native File Included Separately," which means [327] there was an attachment electronically produced that had the actual Excel spreadsheet.

MR. MAGNANINI: And the third sheet is that --

MR. MARGOLIS: Yes.

MS. LOLLAR: Because the spreadsheet was produced in native format.

BY MR. MARGOLIS:

Q. The only question I have, Mr. Carter, is if you recall preparing these documents?

A. I recall inputting this information on the B4 portion. I didn't create this.

Q. Do you recall doing that on a periodic basis, not just on March 14, 2005?

A. I do. I recall doing it several times. I don't know how many times.

Q. The information you recorded there was accurate to the best of your knowledge and belief at the time you did it?

A. Yes.

Q. That's all I have for that document.

Mr. Carter, there came a time where you [328] received a report that there was an organism in the toilet of a KBR employee at one of the living areas; is that right?

A. Yes.

Q. You investigated that after it was reported to you?

A. I did.

Q. You tested the water at the point of use in that living support area; correct?

A. Correct.

Q. And found the absence of free available chlorine?

A. I found an absence of any chlorine.

Q. That caused you to make further inquiries; correct?

A. Yes.

Q. Including speaking to a Sergeant Paul Ru; is that right?

A. Yes.

Q. Sergeant Ru was the noncommissioned officer in charge of the military ROWPU at Ar Ramadi; correct?

[329] A. Correct.

Q. He then informed you that the military had not been disinfecting nonpotable water with chlorine; is that correct?

A. Correct.

Q. What he told you is that water that was being produced for nonpotable use was being filtered, but not disinfected; is that correct?

A. I believe he told me that at that time, yes. He told me that it wasn't -- I mean, specifically I went out and said there's no chlorine in the water, and he said that doesn't surprise me, we've never chlorinated it.

Q. He didn't tell that you the water from the

nonpotable -- that the nonpotable water being provided was from the brine or concentrate stream from the military ROWPU, did he?

A. No.

Q. After he told you that the water was not being disinfected with chlorine, you reported that information to superiors of KBR; correct?

A. Yes.

[330] Q. Did that include Tom Smith?

A. Yes.

Q. Did that include Suzanne Raku-Williams?

A. Yes.

Q. You also provided that information to Mo Orr, who we discussed previously was the HSC coordinator at Ar Ramadi; is that right?

A. That's correct.

Q. Were you ever instructed by Suzanne Raku-Williams or Tom Smith not to prepare an incident report relating to this incident?

A. They didn't want me to, but I don't know how exactly they said it. I can't recall.

Q. Do you recall a discussion or conversation?

A. There was discussion. There was an argument about whether one was necessary, and Harold Orr came to me and made it clear it was his job and I was required to do one so I did.

Q. Was this a conversation you participated in, I assume; correct?

A. Part of it.

[331] Q. Were you ever directed, I guess is my

question, by any of your superiors at KBR not to prepare an incident report?

A. Yes. I was told not to do it. I think it was by Warren Smith until he got back to me, something like that. And then when it was clear that I was required to produce one for Mo, I then went back to Warren and I believe Suzanne was there at that time and told them I have to produce one.

And they then told me to send it to them first so that they could review it before I provided it to Mo, which I did.

Q. Which you did or did not?

A. I did.

Q. And then you provided the incident report to Mo Orr; correct?

A. I provided an updated one after Tom and Suzanne had reviewed it and Tom suggested some corrections to eliminate some things out of it, which I did, and then I sent it to -- I e-mailed it to them and to Harold Orr.

Q. What did he ask you to eliminate?

[332] A. He didn't want the organism mentioned. He wanted me to not come right out and say that there was a micro-organism in the toilet bowl.

Q. Did you confirm that there was an organism in the toilet bowl?

A. I saw what I saw, but I didn't have the testing equipment to determine, so I couldn't say if it was or wasn't, so I said what I saw.

Q. In your report?

A. Yes.

Q. Did he direct you to remove the conclusion that there was no chlorine in the nonpotable water from your report?

A. No.

Q. Did he direct you to remove any reference to any discussions you had with Sergeant Ru with respect to the operation of the military ROWPU from your report?

A. No.

Q. This incident took place on March 24, 2005; correct?

A. I believe that date is correct.

[333] Q. I'm sorry. I may have given you the wrong date. March 23, 2005, does that sound accurate to you?

A. On or about March 23rd.

Q. You then had a discussion with Mo Orr with the brigade surgeon at Ar Ramadi; is that right?

A. That's right.

Q. Brigade surgeon is a physician responsible for the health and safety of the military personnel at Ar Ramadi; correct?

A. Correct.

Q. That was a Captain Matthew Hing; is that right?

A. Yes.

Q. You spoke to him the next day; is that correct?

A. I think it was the next day. It may have been the day after. It was within a few days of identifying the problem.

Q. And you informed him of your concerns; correct?

A. Yes.

[334] Q. Sergeant Ru was at this meeting as well?

A. I don't know that he was present for the first one.

Q. Did you have more than one conversation with Captain Hing?

A. My memory may be wrong. No, he wasn't present for the first one because I first went to him while he was working in the hospital.

Q. Did you have more than one discussion or meeting with Captain Hing about this?

A. I think I possibly did.

Q. Did you ever recall having a meeting with Mo Orr, Sergeant Ru, Captain Hing and yourself to discuss these issues?

A. Yes.

Q. You had done research and found a report with respect to the condition of the surface water in the Euphrates River that you presented to Captain Hing; is that right?

A. Yes.

Q. You didn't do any water testing yourself with respect to the water source for the military [335] ROWPU; is that correct?

A. Correct.

Q. You didn't do any water testing, other than the testing you did after the discovery of this issue, you did no independent water testing with respect to the nonpotable water being produced by the military; is

that correct?

A. I got lost in that.

Q. That was a bad question. Let me back up.

The nonpotable water was being trucked by a KBR subcontractor delivering support areas for the shower units or the toilets, et cetera; correct?

A. Correct.

Q. That's the water that you tested and determined there was no chlorine in it; right?

A. Right.

Q. Did you run any other tests on that water?

A. Besides chlorine?

Q. Correct.

A. No, I didn't have any other ability, any other testing equipment.

Q. You never tested the nonpotable water bag [336] that was storing the nonpotable water produced by the military ROWPU; correct?

A. Correct.

Q. Do you know when the survey that you shared with Captain Hing about the condition of the Euphrates was done?

A. I believe it was done in the '90s.

Q. Nothing more specific than that?

A. No.

Q. Do you know where water samples were taken by the military in the Euphrates River to do that sample?

A. No.

Q. After you shared your concerns with Captain Hing, to your knowledge, did Captain Hing order any medical testing of military personnel at Ar Ramadi?

A. I have no knowledge of what he did after that meeting I had with him.

Q. You didn't hear anything or see anything with respect to any measures along those lines; is that correct?

[337] A. Correct.

Q. Do you know whether or not the brigade surgeon would ultimately have medical responsibility over the health and safety of a KBR employee?

A. I'm sorry, of a KBR what?

Q. Employee at Ar Ramadi.

A. I don't know.

Q. For example, if a KBR employee became seriously ill, such that a KBR medic was unable to handle it, do you know if a KBR employee would go to the medical facility at Ar Ramadi to seek military care?

A. I had heard of people that did that, yes.

Q. Do you know whether or not Captain Hing ordered any medical testing or treatment of KBR employees relating to water quality after the discovery of this issue?

A. I don't have any knowledge of that.

Q. One of the concerns you've raised is that you were prevented by KBR management to inform the troops that the nonpotable water was not being chlorinated; is that right?

[338] A. That's correct.

Q. Who directed you not to do that?

A. Suzanne Raku-Williams.

Q. At that time you had notified Captain Hing of your concerns, however; correct?

A. I don't believe so. Possibly, but I don't believe so. I think that occurred right in the same time period of me producing an incident report. I think that occurred in that same -- I don't know for sure.

Q. Did you not think that Captain Hing was competent to make the judgment as to whether to notify military personnel that the nonpotable water was not being disinfected with chlorine?

MR. MAGNANINI: Objection; vague. You can answer.

THE WITNESS: I didn't think he was. I had to point out to him that the water was his responsibility in the military's own manual. I held it in front of Captain Hing, and I said, are you the command surgeon? And he said yes. I said it says here that this is your job. He said I didn't know [339] that, so I didn't think he did.

BY MR. MARGOLIS:

Q. From a medical perspective, once you informed that to him of your concern that the water was not being chlorinated, did you not feel he was qualified as to whether to make the judgment to inform the troops at Ar Ramadi of the potential risk that you had identified?

A. I didn't think so, based on what Sergeant Ru told him, based on what I observed-- what I heard Sergeant Ru's response to Captain Hing asking him if what I said was true and Sergeant Ru at this point in time said he needed to go and read up on TB Med and would get back to him so that was the last discus-

sions I had with Captain Hing.

So at that point -- up until that point, I didn't believe he knew anything.

Q. When you say "TB Med," you're talking about Technical Bulletin Medical 577; correct?

A. Correct.

Q. You pointed out to Captain Hing it was his responsibility to make a determination of whether or [340] not the nonpotable water should be chlorinated; correct?

A. Yes.

Q. You prepared an e-mail at the time that you believed in your interpretation of TB Med 577 whether to chlorinate nonpotable water was a judgment to be made by the command surgeon at the base; correct?

MR. MAGNANINI: Objection, without seeing the e-mail. You can answer.

BY MR. MARGOLIS:

Q. Do you recall it?

A. I recall that. And yes, I concluded it was his responsibility to make that assessment, which I asked him if he had, and he hadn't.

Q. Have you since changed your interpretation of TB Med 577 as to who is responsible for making that assessment?

A. No, I haven't.

Q. Do you still believe and agree that it's the command surgeon that makes the determination as to whether nonpotable water should be disinfected [341] with chlorine?

A. No. I don't believe that. I'm talking about that he should have ordered an initial assessment of the source water, the Euphrates River.

I want to make sure that I'm not talking about two different things. I don't believe it was in the command surgeon's authority to say the water doesn't need to be chlorinated or does. It's a given.

BY MR. MARGOLIS: Show you Defense Exhibit 56.

(Defendant's Exhibit 56 identified.)

BY MR. MARGOLIS:

Q. Do you recall sending this e-mail to Suzanne Raku-Williams among others on March 24, 2005, sir, about TB Med 577?

A. Yes.

Q. TB Med 577 was an attachment to the e-mail; is that correct?

A. Oh, yes, it appears it is, yes.

Q. You stated in the second paragraph here "The command surgeon 'can' order chlorination at a level of 1.0 ppm followed up with additional [342] procedures. I believe the key word in this regulation is 'can order' This does not necessary indicate a requirement to chlorinate in my opinion."

Is that no longer your view of TB Med 577, sir?

A. That's correct. It's not.

Q. When did you change your view?

A. When I spent more time reading the rest of TB Med 577.

Q. When did you change your view?

A. Once I read the full chapter on the treating surface water.

Q. You hadn't read it at the time that you attached it, cited it and e-mailed it to your bosses?

A. Right. I hadn't read the entire thing.

Q. Is that the reason you left KBR, sir, because you were being prevented from telling the military about nonchlorination of nonpotable water at Ar Ramadi?

A. That's one of the reasons.

Q. On the day you announced your decision to [343] leave, were you videotaped by Tom Smith sunbathing?

A. Yes. I don't know that I made the decision to leave that same day, but that was the final straw, yes.

Q. Sir, after you left, you had a series of communications with employees at KBR about seeking compensation; is that right?

A. I'd say that's accurate.

Q. Chuck Murtoff being one?

A. Yes.

Q. Faith Sproul being another?

A. Yes. Two different issues.

Q. Taking Chuck Murtoff as an issue, did you not request two years of back pay from KBR -- let me stop. Not back pay, because you weren't working for two years. Did you essentially request two years of compensation from KBR for your salary after you left?

A. I don't remember presenting it that way to him. I may have, but I think it was more in terms of a -- he had asked me what do you want, and so I went I want my old job back.

[344] Q. You wanted to return to Iraq?

A. Yeah, if they would clear up what happened and notify all the troops. I had my conditions.

That was one of them.

Q. You don't recall asking for two years of pay?

A. I don't recall just singularly asking for that.

Q. I'm not asking singularly. I'm asking in addition to other things.

A. I don't. I'm not saying that I didn't, but I don't remember that.

Q. In fact, didn't you tell Mr. Murtoff if your conditions weren't met, that you would go to the press?

MR. MAGNANINI: Objection.

THE WITNESS: I may have.

BY MR. MARGOLIS:

Q. You don't recall that?

A. I don't recall that specifically.

Q. Would it be surprise you if you did?

A. No, it wouldn't.

[345] (Defendant's Exhibit 57 identified.)

BY MR. MARGOLIS:

Q. Exhibit 57, if you could please take a look at that. Do you see an e-mail that you forward -- initially an e-mail from you to Ken May that was forwarded to Chuck Murtoff on August 25, 2005?

A. Yes.

Q. You sent that e-mail out?

A. Yes.

Q. Do you see in the middle where you ask for 24 months of compensation "at the rate of a rowpu supervisor position"?

A. I don't see that yet.

MR. MAGNANINI: Read down.

MR. MARGOLIS: After "I have 3 requests and 1 suggestion."

THE WITNESS: What was your question?

BY MR. MARGOLIS:

Q. Did you ask for 24 months of compensation at the rate for a ROWPU foreman?

[346] A. It says that right there.

Q. Did you ask for that or not?

A. I guess.

Q. You sent the e-mail; right?

A. Yes.

Q. That monthly salary would be based on the 12 hours a day, seven days a week that you were falsely reporting on your time cards; isn't that right, sir?

MR. MAGNANINI: Objection; argumentative.

MR. MARGOLIS: I'm just asking the question.

MR. MAGNANINI: Objection; vague. You can answer.

THE WITNESS: Yes, but I was actually asking here for that pay at the rate of a ROWPU supervisor, and I don't know what that pay would have been.

BY MR. MARGOLIS:

Q. It would have been more money?

A. It would have been more, I would think, [347] yes.

Q. It's 84 hours a week at a higher salary rate is what you're asking for?

MR. MAGNANINI: Objection. You can answer.

THE WITNESS: Yes.

(Defendant's Exhibit 58 identified.)

BY MR. MARGOLIS:

Q. This should hopefully take just a second.

Exhibit 58, sir. Is this a copy of the report with respect to the conditions of the Euphrates we were discussing earlier that you provided to Captain Hing?

A. Yes, it is.

Q. After you left KBR, you continued to remain in communications with your former colleagues; is that right? Some of them?

A. Correct, some of them.

(Defendant's Exhibit 59 identified.)

BY MR. MARGOLIS:

Q. I'm going to show you Exhibit 59. Josh Duke was an employee who you worked with at [348] Ar Ramadi; is that right?

A. That's right.

Q. In this e-mail dated April 23, 2005, he seems to be informing you that Tom and Suzanne were fired; is that right?

A. Correct.

Q. Below that, you're e-mailing to him -- you discuss fishing in Montana; correct?

A. Correct.

Q. And you said "Sorry about my leaving."

You "couldn't take Tom one more minute"; is that right?

A. That's right.

Q. That's a reference to Tom Smith; correct?

A. Correct.

Q. And you state below that "I had a great time myself in Dubai, I was stuck there for an extra night and made the best of it. I hooked up with 2 sets of 2 for some great action." What does that mean?

MR. HOLMES: Objection.

MR. MAGNANINI: Objection. We're [349] objecting. You can answer.

THE WITNESS: I have to answer?

BY MR. MARGOLIS:

Q. Yes.

MR. MAGNANINI: Discreetly.

THE WITNESS: Two sets of two women.

BY MR. MARGOLIS:

Q. What does that mean? Are you talking about prostitutes?

MR. MAGNANINI: Objection.

THE WITNESS: Yes.

BY MR. MARGOLIS:

Q. When you say "2 sets of 2," what does that mean?

A. That means four women, not at the same time.

Q. Two different occasions?

MR. MAGNANINI: Objection, but you can answer.

THE WITNESS: Early in the night and later in the night.

BY MR. MARGOLIS:

[350] Q. Other than that activity you talked about, you did fishing in Montana after you left; right?

A. Right.

Q. Did you go to rock concerts after you left?

A. No.

Q. None at all?

A. Not that I remember.

Q. Or any kind of musical concert?

A. No.

Q. You don't recall sending an e-mail to any of your colleagues about attending one; is that right?

A. Just jogged my memory. I think I did attend a concert in Canada.

Q. Why did you go to Canada?

A. To live with a girlfriend.

Q. Another one of your colleagues was Don Mandy; is that right?

A. Yes.

Q. He has a nickname waxee; is that right?

A. Yes. That's his e-mail address.

[351] Q. So that's Don Mandy's e-mail address?

A. Correct.

Q. Don Mandy sent you KBR documents after you left KBR; isn't that right?

A. He sent me some e-mails.

Q. Sent you a copy of Will Granger's report, didn't he?

A. No.

Q. He did not do that?

A. Of Will Granger's report?

Q. Correct.

A. No.

Q. Did he send you a summary of the report?

A. No.

Q. Is it your testimony that he sent you no information with respect to Will Granger's report?

MR. MAGNANINI: Objection to form. You can answer.

THE WITNESS: That's not what I'm saying.

BY MR. MARGOLIS:

Q. What did he tell you about Will Granger's [352] report?

A. He told me nothing about Will Granger's report. He sent me an e-mail between other individuals that had a few sentences from Will Granger's report. I didn't even know Will Granger's report existed until Will Granger told me himself.

Q. Your testimony is you had a discussion with Will Granger himself when he told you about the report?

A. Correct.

Q. Do you know whether or not Don Mandy was subject to the same confidentiality provisions you were?

A. I don't know that.

Q. Any reason to think that he didn't?

A. He was in an administrative position so I don't know. I don't know.

(Defendant's Exhibit 60 identified.)

BY MR. MARGOLIS:

Q. I'm putting before you Exhibit 60. Sir, is Exhibit 60 an e-mail where Mr. Mandy is forwarding to you after you've left the company on [353] 21 July 2005 an internal KBR e-mail with respect to Will Granger's review of the water at Ar Ramadi?

A. Correct.

Q. Did you offer him compensation for assisting you?

A. No.

MR. MAGNANINI: Objection; form, vague.

BY MR. MARGOLIS:

Q. Did he ask you for money for assisting you?

A. No.

Q. Never did?

A. No.

MR. MARGOLIS: Exhibit 61.

(Defendant's Exhibit 61 identified.)

BY MR. MARGOLIS:

Q. Do you see an e-mail exchange between you and Don Mandy on your e-mail to him as 1 August '05

and he responds to you on 3 August of 2005?

A. I see that, yes.

Q. At the bottom he has "WOrd! Hope this was some good info. Let me know how the package goes.

[354] I'm game for a smaller one...oR of the same SiZe!"

Do you know what he's referring to?

A. No, I don't.

Q. Do you ever use the term "package" in e-mails, Mr. Carter?

A. Not that I recall.

Q. Do you recall using that term in any e-mails with your former colleagues at KBR after you left KBR's employment?

A. No, I don't recall that. It's not a word I would use.

MR. MARGOLIS: Exhibit 62.

(Defendant's Exhibit 62 identified.)

BY MR. MARGOLIS:

Q. Here's another e-mail from Mr. Mandy to you dated July 17, 2005, "Ben, What's up dude? I was fortunate enough to indrectly receive an email referencing your name...anyways I got more. So what up? Let me know how I can help...how I can receive some potential compen$ation." Instead of an S, there's a dollar sign. Do you see that?

A. I do.

[355] Q. Do you recall now whether or not Mr. Mandy asked how he could receive some potential compensation for assisting you in your case against

KBR?

MR. MAGNANINI: Objection to form. You can answer.

THE WITNESS: I think he was referring to my workers' comp, my DBA case. I really do. That's what I thought at the time. This was before I had even filed anything, so I never even heard of Qui Tam in July, so that's what this was in regards to.

BY MR. MARGOLIS:

Q. So substitute DBA -- Qui Tam and insert DBA. It's your understanding he's nonetheless asking how he can make money for assisting you with the DBA claim?

MR. MAGNANINI: Objection to form.

THE WITNESS: I don't believe that's what he was asking. I think he was -- my understanding of it was he was wanting to know if he could also have a DBA claim because of the exposure to the [356] contaminated water.

(Defendant's Exhibit 63 identified.)

BY MR. MARGOLIS:

Q. Showing you Exhibit Number 63, sir.

Here's another e-mail at the bottom of this e-mail chain. It's an e-mail from you to Don Mandy dated 25 August 2005; is that right?

A. That's correct.

Q. "Don, So...What did you think of that?

Please keep that under wraps for now. I promise you that should all this pan out that I will personally make this all worth $$$$ your while"; is that correct?

A. That's correct.

Q. Were you offering him money here, sir?

MR. MAGNANINI: Objection to form. You can answer.

THE WITNESS: No.

BY MR. MARGOLIS:

Q. How were you going to personally "make this all worth $$$$" his while?

A. Let me read the rest of it so I can be [357] sure I have this in context. Once again, this refers to the DBA claim.

Q. Did you offer, in fact, here to personally deposit a certain amount for his efforts in context with your DBA claim, sir?

A. It doesn't say that with the DBA claim, but that's what it says here, yes.

Q. That's what you meant; right?

A. Possibly, but not -- I was still thinking that Don was going to be filing a claim also, waxee, and that's what I was working on at this time.

Q. Why did you tell him you would personally deposit a certain amount for Don Mandy's efforts?

A. I don't know.

MR. MAGNANINI: Objection to form.

BY MR. MARGOLIS:

Q. You don't know why you said that?

A. Yeah. Can I go on? I think it was because I didn't know if he was going to still be in Iraq, if he was staying there or coming back. He didn't know either. I don't know. That's all I can say.

[358] Q. Was there a time that you had a dispute

with Ken May as to whether or not both of you would be relators in your Qui Tam case?

A. Yes.

Q. You actually filled without Mr. May; is that right?

A. That's right.

Q. And Mr. May objected to that?

A. Yes.

Q. And you knew by filing him, you could prevent--by you filing first and alone, you could prevent him from making a claim; right?

MR. MAGNANINI: Objection; calls for legal conclusions or attorney-client privileged conversation. If you can answer without infringing on that, you can do so, Mr. Carter.

THE WITNESS: I did what my attorney told me to do.

MR. MAGNANINI: I'm going to tell you to stop there.

BY MR. MARGOLIS:

Q. Sir, what is your understanding as to what [359] obligation, if any, KBR had with respect to nonpotable water produced by the military in Ar Ramadi during the time you were there?

MR. MAGNANINI: Objection; vague. You can answer.

THE WITNESS: I believed that they were responsible for testing it numerous times a day at various points of use. And they were responsible for chlorinating the delivery trucks, the nonpotable water trucks that they had contracted to deliver the water

to the base on. And they were responsible to put up signs saying that the water was nonpotable. Didn't do any of that.

BY MR. MARGOLIS:

Q. By the way, did you receive training in Houston before you deployed instructing you to use only bottled water for potable water?

A. Yes.

Q. And that would include for drinking and brushing teeth; that is correct?

A. Correct.

Q. With respect to -- what's your basis for [360] saying that KBR had an obligation to test the nonpotable water produced by the military ROWPU in multiple points of use several times a day?

A. I don't know exactly where I learned that.

Q. So you can't articulate today what your basis is for that belief?

A. It was clearly defined in the TB Med 577. And then some of it is common sense with water purification being a water operator, I knew that the EPA has certain regulations that require you to monitor chlorine levels based on how many gallons and things like that.

So I knew it was a requirement that you test it three times a day, sometimes once an hour.

Q. That water was potable water; isn't that correct, when you're talking about requirements in the States?

A. No, I'm not. We were a much bigger risk taking a shower in that water than we were drinking it.

Q. Anything else? Any other reasons for your belief that KBR had that obligation?

[361] A. I don't recall at 7:00 tonight where I read it, but I've read that was their obligation.

Q. What about your understanding it was KBR's obligation to chlorinate nonpotable water that was produced from the military ROWPU at Ar Ramadi when you were there? What's your basis for that?

A. I don't recall.

MR. MARGOLIS: This is likely the last document I'll show you. 63 is I think what we're up to.

MR. MAGNANINI: 64.

MR. MARGOLIS: 64.

(Defendant's Exhibit 64 identified.)

MR. MARGOLIS: Just for purposes of the record, I don't know if we have the Meyers exhibit --well, no. I believe this is a -- can I just get a representation -- it doesn't have a Bates number. This is a document, I believe, Mr. Holmes, that you produced or your office produced in color, and that's why it doesn't have a Bates number on it.

It was previously produced but with an REL number on it --

[362] MR. HOLMES: If it's the same document that I had an exchange with Tirzah about, we buttoned it up and put the Bates number on it. If we didn't, we can take of that after the deposition.

If there's any dispute afterwards, we'll straighten it out.

MR. MARGOLIS: We'll make a representation it's the same other than color and if there is, we'll

straighten it out.

MR. HOLMES: It appears to be the same other than based on color.

BY MR. MARGOLIS:

Q. Sir, you've had a quick chance to take a quick look at the e-mail?

A. That's correct.

Q. That's an e-mail from Friday, the 11th of February 2005 from Ken May to yourself with the subject "Here ya go"; is that right?

A. That's right.

Q. Do you see on the second page at the top a statement "All written accounts written in Blue," and it's in the color blue, "is from Ben Carter, and [363] all words written in Green is from Ken May"; is that right?

A. I do see that.

Q. Do you recall that the material that you supplied was in blue?

A. I don't recall that I complied with that.

Q. Do you have any reason to believe or can you direct my attention to portions in green that you supplied as opposed to portions in blue?

A. Yeah. I know I didn't do any of the green. All I'm saying is I don't know that I --

Q. There is some portions in blue if that's what you're asking.

A. In blue.

Q. I'll direct your attention to parts in blue if that might help you, page 1, 2 -- actually, if you look at the

top there are some numbers on it.

If you could look at page 6 of 10, for example, do you see there's a discussion there, "WATER CONTAMINATION INVESTIGATION." Do you see -- and beneath it there's portions in blue?

A. Yes.

[364] Q. Does that refresh your recollection you added the portions in blue?

A. Yes. This appears to be just copied and pasted on to here.

Q. By you?

A. Yes.

Q. Did you ever have a chance to view the military's testing results of nonpotable water produced by the military ROWPU in the time frame you were there -- actually, at any time?

A. No.

MR. MARGOLIS: Obviously for purposes of the pending issue, we'll have to ask to hold the deposition record open until that's resolved with respect to the disclosure statement and the instructions not to answer questions in that respect.

MR. HOLMES: For that limited purpose. We had a discussion at the hearing to that effect, Craig, yes.

MR. MAGNANINI: Craig, just for the record, then, our proffer of allowing you to ask the [365] question in exchange to be no waiver, there's no agreement to seek the disclosures and we withdraw our objection. We're not going forward with that.

MR. MARGOLIS: If we're going to preserve this issue for potential review from a court, what I think

is a fair statement is you had represented to us that you would allow Mr. Carter to answer a question as to whether or not he disclosed a disclosure statement any allegations related to timekeeping at the time the disclosure statement was filed.

Our position--but would not agree to provide us with a copy of the disclosure statement; is that correct?

MR. MAGNANINI: Correct. Our question was going to be, which we would waive the privilege on and allow Mr. Carter to answer is, did you discuss time sheets in the written disclosure to the government at the time you filed your complaint. And in exchange, you're correct, we would not produce the disclosures, but that we've tabled.

MR. MARGOLIS: I think for purposes of the [366] record, we'd say that, first of all, that question would not be sufficient in our view to get a full picture of what, if any, timekeeping-related allegations were included in the disclosure statement.

The other issue that we would have is Mr. Carter's testimony is not a substitute for the disclosure statement itself. That document, of course, would speak to itself beyond the testimony in that whether or not KBR would bring any motions relating to a potential failure to follow the procedural requirements for filing a False Claims Act by a relator and would depend on what the actual physical disclosure statement says.

We believe we can properly evaluate and present such a motion to the court without such a disclosure statement.

We were amenable to discussing with Counsel a potential privilege nonwaiver agreement with respect to the disclosure statement, but we're not willing to accept Mr. Carter's limited testimony as you outlined it in lieu of that.

MR. MAGNANINI: That's fair.

MR. MARGOLIS: With that, I think we're done for the day.

VIDEO OPERATOR: The deposition is concluded today at 7:31.

(Whereupon, at 7:31 p.m., the deposition was concluded.)

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
ex rel. CARTER,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:08-cv-1162-JCC/JFA
HALLIBURTON CO., *et al.*	)	
Defendants.	)	

DECLARATION OF HAROLD ORR

I, Harold Orr, declare that I am over the age of 18 years, that I am competent to testify on the matters set forth below, and that the following statements are made on the basis of personal knowledge, information and belief:

1. I was stationed in Iraq as an employee on behalf of the Defendants, Halliburton Company, KBR, Inc., Kellogg Brown and Root Services, Inc., and/or Service Employees International, Inc., between Sep-

tember 2004 and March 2005.

2. I resigned from the Defendants' employ in March 2005.

3. While in Iraq, I was originally stationed in Al Asad, Iraq, and later transferred to Ar Ramadi, Iraq.

4. My job title on behalf of the Defendants at site B4 Ar Ramadi was HSE ("Health, Safety, and Environmental") Coordinator.

5. While stationed at Al Asad, in September 2004, I met my manager, Area B Sites HSE Manager Tracy Donahoo.

6. In or around September 2004, Mr. Donahoo provided me with direct instruction concerning weekly completion of timesheets as an employee on behalf of the Defendants.

7. According to Mr. Donahoo, my timesheets had to read 12 hours per day, 7 days per week, for every day and every week that I completed a timesheet. Mr. Donahoo stated that I should complete my timesheets with the 12 hours per day figure regardless of how much time I had worked each day in a given week as this was my assigned shift while in country.

8. Later during my tenure, Suzanne Raku Williams directed me to supervise and sign the timesheet entries of two HSE subordinates, Damon Scarborough (Environmental) and David Halliday (Hazmat).

9. At Suzzanne Raku William's instruction, I reviewed Mr. Scarborough and Mr. Halliday's timesheets each week. I signed off on those timesheets. I reviewed timesheets completed and signed by Mr.

Scarborough and Mr. Halliday representing that each had worked 12 hours per day each week during days and weeks when Mr. Scarborough and Mr. Halliday had not performed any work at all. This continued through March 2005.

I declare under penalty of perjury that the above statements are true and correct to the best of my knowledge and belief.

Date: 2/19/2010 /s/ Harold Orr

APPENDIX R

"An Oversight Hearing on Whether Halliburton Has Failed to Provide Clean Water to United States Troops in Iraq"

Monday, January 23, 2006
1:30 p.m. — 3:30 p.m.
628 Dirksen Senate Office Building

Transcript

WITNESSES:

BEN CARTER, FORMER KELLOGG BROWN & ROOT EMPLOYEE KEN MAY, FORMER KELLOGG BROWN & ROOT EMPLOYEE ERIK OLSON, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL

DORGAN: I'm going to call this hearing to order. I'm Senator Dorgan and chairman of the Democratic Policy Committee.

I'm joined by my colleague, Senator Dayton, a member of the Armed Services Committee. Senator Dayton has been with us for a number of the hearings we've held. This will be the seventh hearing that the Policy Committee has held as a part of a series of hearings on problems, particularly with respect to contracting, and contracting especially in Iraq.

In most cases at these hearings we have had whistleblowers come forward. Most of the hearings have

dealt with the company Halliburton, Kellogg Brown & Root, but other companies also have been the subject of hearings.

We have seen a time now when a substantial amount of money, billions and billions of dollars, have been appropriated by the Congress. And those same billions of dollars have been awarded in contracts to provide various services to our troops and services to reconstruction in Iraq.

In many cases, they have been very large, no-bid, sole-source contracts. And what we have discovered, regrettably, is that there has been precious little oversight, a substantial amount of waste, a substantial amount of abuse.

And that disserves our troops and disserves the American taxpayer.

We take no pleasure in calling hearings of the type that we have today, but we believe it is the responsibility of the United States Congress to do oversight.

We spend over $2 trillion a year in public spending. It's the taxpayers' money. And there's a requirement that there be oversight with that spending, especially in circumstances where money goes out in no-bid, sole-source contracts.

CARTER: Thank you.

DORGAN: Mr. Carter, thank you very much.

Let me say that Mr. Carter joined KBR with more than 20 years experience as a water purification ex-

pert. From 1989 until 1995 as a proprietor of Air & Water Technologies, he ran a water testing laboratory, designed and analyzed water purification systems, and had a federal contract, in fact, to create and operate a reverse osmosis water production plant.

I say that only because I didn't prior to your testimony, so that people understand your background.

Next, we have with us Mr. Ken May, who served in Iraq as a KBR employee from January through April 2005, served as an acting operations specialist with KBR in Ar Ramadi, Iraq. He now resides in Louisville, Kentucky, where he is a retail manager.

He has a degree in business management and a substantial amount of experience.

Mr. May, thank you for joining us.

MAY: Good afternoon, everybody.

And I'd like to thank Senator Dorgan and Senator Dayton for taking of their time today to hear our words.

My name is Ken May, and I'm a retail manager in Louisville, Kentucky.

From January 2005 to April of 2005, I was an acting operations specialist in the KBR operations department at Camp Ar Ramadi, Iraq. My responsibilities in that position included daily, weekly and monthly reports to both site management and the KBR project management offices in Al Asad, Iraq, coordinating air and ground transportation with the

military for KBR and VIP personnel, and performing payroll and other human resource functions.

In my time with KBR, I also fulfilled a variety of other short- term duties and assignments. I became aware of water quality problems at the base on March 23rd, 2005, when Ben Carter asked me to instruct KBR personnel to leave their water running, which would assist with chlorination of the water distribution system.

Ben told me that another KBR employee had reported a larva in his lavatory, which Ben had confirmed. I later learned from Harold On, who went by Mo, that Ben had discovered problems with the water.

In the days that followed, as I performed my regular duties, I heard rumors that KBR and site management were still discussing the water quality problem. Mo told me that site management wasn't really addressing the issue and suggested that they were simply trying to sweep it under the rug.

I knew that Mo, our health, safety and environmental coordinator, had other problems with site management, and specifically with site manager Suzanne Raku Williams, so T didn't know how much credence to give what he told me about the water.

Within a few days, however, I learned from Ben that what Mo had said was in fact accurate: that the water had not been properly chlorinated, and that Ben had independently found a U.S. government report that detailed contaminants and pathogenic organisms from the Euphrates River.

MAY: On March 26, 2005, senior KBR employee relations specialist Terrence Copeling (ph) came to Ar Ramadi to investigate unrelated complaints about site management. During his visit, Copeling (ph) interviewed me about allegations that site management had knowingly and unnecessarily put employees in harm's way.

More specifically, Copeling (ph) was investigating site management's retaliatory conduct towards employees who raise concern about everything from force protection shelters to health and safety issues.

In the course of the interview, I mentioned to Copeling (ph) that on top of everything else, we appear to have a water contamination problem. Copeling (ph) told me then that he would resolve the problem -- meaning site management.

No action was immediately forthcoming.

Although the site manager and chief of services were terminated within several weeks -- I have on here within two months; it was actually several weeks -- before then, however, they had succeeded in forcing their critics, including me, then, and Mo to resign and leave Iraq.

I have brought with me today Mo's letter of resignation in which he expressed his disgust with site management -- to your left. And I'm going to read it, if that's OK, sir.

"There are still possible health issues, and this has been confirmed through Charlie Med (ph), and I

am trying to make sure we do all that is possible to prevent health risks to our employees.

"This behavior has been going on for a long time, and I no longer feel that I want to work for an environment where deception and fraud are commonplace when no recourse or disciplinary action are taken.

"I am resigning now, as of this e-mail to all pertinent parties, and will copy H.R. to ensure that this is recorded for all."

DORGAN: Now, let me just say that this says "from Jason."

MAY: Jason Walsh is a person who sent us this e-mail, who works for KBR. And he...

DORGAN: So he forwarded a letter from Mo?

MAY: Correct.

DORGAN: And tell me Mo's title again.

MAY: HSC coordinator -- health, safety and environmental.

DORGAN: OK.

MAY: After I returned to the states, I remained in contact with Ben. We both were concerned with the problems we had uncovered, and concerned as well about our own health and safety.

After a barber in Ar Ramadi nicked the back of my neck with a razor, and after I had washed the cut in

the sink, I developed a bad and sustained rash that I believe to be connected to the water.

Both in Ar Ramadi and after my return to the states, I also experienced occasional but reoccurring gastrointestinal problems comparable to food poisoning.

I know many others who have experiences similar symptoms.

Last but not least, since returning from Iraq, I have noticed vertical ridges in my fingernails which I understand to be possible indicator of various digestive or other health problems.

Because Ben has had continuing difficulty pursuing his own health claims with Halliburton and their insurer, AIG, I have chosen not to commit to a course of treatment until I know that I will be treated, properly taken care of.

I have recently moved to a new job in a new state, and cannot afford the time required to fight as Ben has. I also believe that Halliburton knows that it exposed both its employees and American troops to contaminated water and has a duty and responsibility to provide necessary testing and support.

I do not believe that they have done so.

Like Ben, I have remained in contact with former Halliburton colleagues still in Iraq. Last spring, they informed me that, after my own departure in April 2005, the reports that Ben, Mo and I had sent up to KBR chain of command led Will Granger to investigate Ben's findings.

MAINE: In an e-mail forwarded to me by another KBR employee, which -- I have another chart -- Will Granger, "Fact: We exposed a base camp population, military and civilian, to a water source that was not treated. The level of contamination was roughly two times the normal contamination of untreated water from the Euphrates River."

When asked how long the exposure may have lasted, Granger later wrote that, "The exposure may have been occurring since the initial presence of KBR individuals at Ar Ramadi."

During my tenure at Ar Ramadi, I and many others observed repeated acts of poor behavior by site management and the project management office in Al Asad.

The fact that these behavior patterns undermined essential checks and balances to ensure contract obligations came as no surprise to me.

I, along with many others, observed on an almost daily basis how our KBR site management team made our presence more of a burden to the military than the essential resource that we should have been.

The disregard for essential health, safety and security measures, time card fraud, fraudulent documentations and overbilling, not to mention the constant barrage of daily threats and retaliatory behavior from our leadership, made life at Ar Ramadi nearly unbearable.

Because of the ongoing, unresolved problems at Ar Ramadi prior to discovery of water contamination,

during discovery and ensuing investigations and the continued cover-up after discovery to this day, immediate attention is required.

The fact that Halliburton denies a water contamination problem ever existed is simply incredible, especially given that their own internal company documentation clearly indicates otherwise.

Had the project management office required site management to implement and track water analysis checks three times a day, as per the contact requirements at Ar Ramadi, not to mention the countless other camps in Iraq, the issue of water contamination would have been identified immediately and corrective measures implemented.

Instead, it is my belief that Halliburton officials knew of this problem long before the discovery at Ar Ramadi and weighed the costs of disclosing that information against the one to three percent cost- plus profit margin.

Halliburton's continued denial and inaction has allowed nine more months to pass, possibly exposing thousands of military personnel and contractors to unnecessary risk.

This, in my mind borders on treasonous if not subversive conduct which simply cannot be tolerated.

While aware of my own health concerns, both immediately and over the long term, I also realize that our troops in Iraq put their lives on the line every day.

The least I can do, the least we as a nation can do, and certainly the least Halliburton can do, is to tell our troops the truth and to provide them with the resources that they expect and deserve.

Thank you.

* * *

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 29 2014
OFFICE OF THE CLERK

No. 12-1497

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL, PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Wartime Suspension of Limitations Act—a criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," 18 U.S.C. §3287, and which this Court has instructed must be "narrowly construed" in favor of repose—applies to claims of *civil* fraud brought by private relators, and is triggered without a formal declaration of war, in a manner that leads to indefinite tolling.

2. Whether the False Claims Act's first-to-file bar, 31 U.S.C. §3730(b)(5)—which creates a race to the courthouse to reward relators who promptly disclose fraud against the government, while prohibiting repetitive, parasitic claims—functions as a "one-case-at-a-time" rule allowing an infinite series of duplicative claims so long as no prior claim is pending at the time of filing.

STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement, set forth at page II of the Petition for a Writ of Certiorari, remains accurate.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the district court is under seal and unreported (J.A. 552-583). The district court released an unsealed version of its opinion (Pet. App. 47a-76a) which is unreported but available at 2011 WL 6178878. The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 710 F.3d 171. The order denying the petition for rehearing en banc (Pet. App. 77a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2013. Pet. App. 1a. That court denied a petition for rehearing en banc on April 23, 2013. Pet. App. 77a. The petition for a writ of certiorari was was filed on June 24, 2013, and granted on July 1, 2014. J.A. 245. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-14a.

STATEMENT

More than two centuries ago, addressing one of the Republic's earliest *qui tam* statutes, Chief Justice John Marshall wrote that it "would be utterly repugnant to the genius of our laws" if "an individual would remain forever liable" under it. *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805); see also Act of Mar. 22, 1794, 1 Stat. 347, 349. The plaintiff there sought to avoid the two-year statute of limitations by

construing it to apply only to criminal prosecutions and not to civil actions to recover the forfeiture, arguing that it was impractical to bring suit within that period. *Adams*, 6 U.S. (2 Cranch) at 338-339. Writing for a unanimous Court, Chief Justice Marshall rejected an interpretation under which "actions of debt for penalties * * * might, in many cases, be brought at any distance of time," reasoning that "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a [civil] pecuniary forfeiture." *Id.* at 342.

While the great Chief Justice's words are no less true today, see *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (reaffirming *Adams*), a sharply divided Fourth Circuit panel here construed two statutes in a manner no less "repugnant" to bedrock principles of repose, effectively eliminating the statute of limitations for claims of civil fraud against the government, and allowing private plaintiffs to file and refile duplicative claims indefinitely. First, the panel construed the Wartime Suspension of Limitations Act ("WSLA")—a *criminal code* provision that tolls the statute of limitations for "any offense" involving fraud against the government "[w]hen the United States is at war," 18 U.S.C. §3287—to apply to *civil* fraud claims brought by private relators, although for decades, all three branches of government understood that provision to apply only to crimes. See pp. 19-27, *infra*. And it did so despite this Court's longstanding insistence that the WSLA be "narrowly construed" in favor of repose, *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953); accord *United States* v.

McElvain, 272 U.S. 633, 639 (1926) (act must "be construed strictly, and held to apply only to cases shown to be clearly within its purpose"), and its rejection of indefinite tolling in an opinion that emphasized that the False Claims Act ("FCA") contains an "*absolute* provision for repose" after 10 years. *Gabelli*, 133 S. Ct. at 1224 (emphasis added).

Under the panel's ruling, *qui tam* defendants face a statute of limitations that has been frozen in time since *at least* 2001 (and possibly 1991) for any possible fraud claim that the government or a self-interested relator might eventually bring under the FCA's "essentially punitive" liability scheme. *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). That limitations period will not expire until years after the President or Congress has formally terminated the conflicts in Iraq and Afghanistan—which, as a practical and political matter, may never happen.

Second, the panel vitiated the False Claims Act's first-to-file bar, 31 U.S.C. §3730(b)(5), long understood to provide an essential constraint on *qui tam* actions by encouraging plaintiffs to promptly disclose fraud so the government can investigate, while barring duplicative, parasitic claims that the government can pursue on its own. See, *e.g.*, *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011). The panel held that duplicative claims barred at the time of filing can be revived and refiled once earlier suits are dismissed. The panel thus transformed a prohibition on duplicative private claims into a novel "one-case-at-a-time" rule that encourages private relators to delay filing claims to

maximize their dollar value, to disclose information and litigate claims piecemeal, and to refile duplicative complaints indefinitely.

Both holdings are suspect under virtually *any* interpretative approach, because they are divorced from the statute's text, history, and purpose. The panel's maximalist reading dramatically extends potential *qui tam* liability, with "dire effects" (Pet. App. 46a (Agee, J., concurring in part and dissenting in part)) for a broad range of industries, from defense contracting to health care to financial services. The decision ignores this Court's warnings that "extend[ing] [a] limitations period to many decades" "thwart[s] the basic objective of repose underlying the very notion of a limitations period." *Gabelli*, 133 S. Ct. at 1223. Congress could not have intended so radically to "alter the fundamental details" of the WSLA and FCA through the "vague terms [and] ancillary provisions" on which the panel decision rests. *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

A. STATUTORY BACKGROUND

1. The FCA creates a cause of action against "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States * * * a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a)(1) (2006). It authorizes a private "relator" to bring a *qui tam* civil action "in the name of the Government." 31 U.S.C. §3730(b)(1). The relator must, however, initially file a complaint under seal, and serve it on the United States (but, initially, *not* the defendant), with a "writ-

ten disclosure of substantially all material evidence and information the [relator] possesses." *Id.* §3730(b)(2). The case remains sealed for 60 days (or longer, for good cause), at which point the government may either "proceed with the action" itself, or decline to intervene, "in which case the [relator] * * * shall have the right to conduct the action." *Id.* §3730(b)(4).

The FCA's "essentially punitive" liability scheme, *Stevens*, 529 U.S. at 784-785, includes treble damages, civil penalties up to $11,000 per claim, attorney fees, and costs. 31 U.S.C. §§3729(a), 3730(d)(1); 28 C.F.R. §85.3(a)(9). It creates a significant financial incentive for private suits: Where, as here, the United States declines to intervene, the relator receives "not less than 25 percent and not more than 30 percent" of the recovery, plus expenses, attorney fees, and costs. 31 U.S.C. §3730(d)(2).

The FCA also contains reticulated limitations provisions. A *qui tam* action generally "may not be brought * * * more than 6 years after the date on which the [FCA] violation * * * is committed." 31 U.S.C. §3731(b)(1). The United States may sue within three years of "when facts material to the right of action are known or reasonably should have been known by the [relevant government] official." *Id.* §3731(b)(2). But Congress paired that discovery rule with an "absolute provision for repose," *Gabelli*, 133 S. Ct. at 1224, providing that "*in no event* [may suit be brought] more than 10 years after the date on

which the violation is committed." 31 U.S.C. §3731(b)(2) (emphasis added).[1]

In balancing incentives for private relators with statutory limitations on suits, the FCA reflects a careful legislative compromise. "When first enacted, the [FCA] allowed relators to file suits and receive a share of the government's recovery even if they personally did nothing to help expose the alleged fraud." *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 233 (3d Cir. 1998) (discussing *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943)). "*Qui tam* litigation surged as opportunistic private litigants chased after generous cash bounties and * * * often brought parasitic lawsuits copied from preexisting indictments." *United States ex rel. Findley* v. *FPC-Boron Employees' Club*, 105 F.3d 675, 679-680 (D.C. Cir. 1997). In response, Congress amended the FCA in 1943 "to do away with these so-called 'parasitical suits.'" *Pettis ex rel. United States* v. *Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978).

Congress amended the Act again in 1986. False Claims Amendments Act of 1986, Pub. L. 99-562, 100 Stat. 3153; *LaCorte*, 149 F.3d at 233-234. Those amendments, which enacted §3730(b)(5)'s "first-to-file bar," sought "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of oppor-

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[1] Courts are divided about whether §3730(b)(2)'s discovery provision applies to private *qui tam* suits. *E.g.*, *United States ex rel. Sanders* v. *N. Am. Bus Indus., Inc.*, 546 F.3d 288, 293-296 (4th Cir. 2008) (adopting majority view that provision applies only where "the United States is a party"; collecting authorities).

tunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Congress sought to "walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior" and repetitive suits. *United States ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003).

The "first-to-file" bar is essential to this compromise. It provides that "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The bar serves the "twin goals of rejecting suits which the government is capable of pursuing itself" because it is already on notice of the alleged fraud, "while promoting those which the government is not equipped to bring on its own." *Batiste*, 659 F.3d at 1208; accord *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009) (bar "ensur[es] that the government has notice of the essential facts of an allegedly fraudulent scheme"); *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("Once the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied.").

The FCA also contains a "public disclosure bar," which at times relevant here provided that:

> [n]o court shall have jurisdiction over an action under th[e] [FCA] based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, * * * unless the action is

> brought by the Attorney General or the person bringing the action is an original source.

31 U.S.C. §3730(e)(4)(A) (2008). "[O]riginal source" means "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing a [*qui tam*] action." *Id.* §3730(e)(4)(B).[2]

2. The Wartime Suspension of Limitations Act is a World War I- and II-era criminal code provision that tolls the statute of limitations for "any offense" involving fraud against the federal government "[w]hen the United States is at war." 18 U.S.C. §3287. It originated in the Nation's "gigantic and hastily organized [wartime] procurement program[s]," *Bridges*, 346 U.S. at 216-219, and reflects Congress's recognition that "'[d]uring the World War[s] many frauds committed against the Government were not discovered until the 3-year statute of limitations [for federal crimes] had almost expired,'" because "'[t]he law-enforcement branch of the Government'" was "'busily engaged in its many duties, including the enforcement of the espionage, sabotage,

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[2] In 2010, Congress amended the public disclosure bar to remove the reference to "jurisdiction" and revise the categories of qualifying disclosures. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §10104(j)(2), 124 Stat. 119, 901 (2010). Those amendments do not apply retroactively, see *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010), and the district court found them inapplicable to relator's complaint, which alleges conduct from 2005. J.A. 225-226.

and other laws.'" *Id.* at 219 n.18 (quoting S. Rep. No. 77-1544, at 1-2 (1942)).

Congress first extended the statute of limitations for certain "offenses" shortly after World War I. See Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220. Because that statute was enacted after hostilities terminated (see Joint Resolution, 42 Stat. 105, ch. 40, 1 (July 2, 1921)), Congress did not authorize open-ended tolling, but simply lengthened the normal criminal limitations period from three years to six. See 88 Cong. Rec. 4759 (1942). The statute expressly "relat[ed] to limitations in criminal cases," and provided that:

> No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed. Provided, however, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, * * * and now indictable under any existing statutes, the period of limitation shall be six years. * * *

42 Stat. 220. The proviso thus "appli[ed] to offenses theretofore committed and not already barred." *McElvain*, 272 U.S. at 637.

When that period had elapsed, Congress repealed the 1921 statute. See Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51. But Congress temporarily revived wartime tolling during World War II, providing that:

> the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. * * *

Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.

Two years later, with the 1945 expiry date approaching, Congress amended the WSLA again as part of the Contract Settlement Act of 1944, to provide that:

> [t]he running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner * * * shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *

Pub. L. No. 78-395, 58 Stat. 649, 667 (1944). In addition to minor changes in phrasing, the 1944 amendments extended tolling "until three years after the termination of hostilities in the present war," and deleted the phrase "now indictable under any existing statutes," carried over from the 1921 statute. *Ibid.* The 1944 statute specified, however, that the statute "shall apply to acts, offenses or transactions where

the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law." *Ibid.*[3]

In 1948, Congress permanently reenacted the WSLA with only minor revisions to remove references to World War II, and placed it in title 18 of the United States Code, a comprehensive collection of the criminal laws. See Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, 62 Stat. 683, 828. The 1948 WSLA closely tracked its predecessors, adding language triggering tolling "[w]hen the United States is at war," and deleting references to "the present war," and "acts" and "transactions," such that the provision applied only to the narrower term "offenses." *Ibid.*

The WSLA remained unchanged until 2008, when Congress expanded the triggering events to include periods when "Congress has enacted a specific authorization for the use of the Armed Forces," and extended the suspension period until "5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress." Pub. L. No. 110-417 §855, 122 Stat. 4545 (2008) (codified at 18 U.S.C. §3287 (2009 Supp.)). A Senate Judiciary Committee Report explained that the legislation would "protect American taxpayers from criminal contractor fraud" and "mak[e] the law consistent with the current statute of limitations for criminal fraud offenses," which

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[3] Congress amended the WSLA in October 1944 to cover "offense[s]" including those "committed in connection with the care and handling and disposal of [surplus] property." Surplus Property Act of 1944, Pub. L. No. 78-457, 58 Stat. 765, 781.

had been extended from three to five years. S. Rep. No. 110-431, at 1-2 (2008) (J.A. 198).

B. FACTUAL BACKGROUND

1. Kellogg Brown & Root Services, Inc., and related entities (collectively, "KBR") provided logistical services to the U.S. military in Iraq under a multi-year government contract. In 2005, relator Benjamin Carter worked for KBR as a water purification operator in Iraq. Pet. App. 3a. In 2006, Carter filed a *qui tam* complaint, which he amended in 2008, alleging FCA violations involving contaminated water ("*Carter 2008*"). The government reviewed Carter's complaint under seal pursuant to 31 U.S.C. §3730(b)(2), and declined to intervene. After the district court dismissed the complaint, Carter amended again, this time alleging false billing for labor costs. Pet. App. 4a. Shortly before trial, the government notified the parties about an earlier-filed *qui tam* action in California that alleged similar timekeeping fraud. Because the claims were related, the district court dismissed Carter's lawsuit under the first-to-file bar. *Id.* at 4a-5a; J.A. 51.

While Carter's appeal was pending, the earlier California case was dismissed. Carter then refiled what he concedes to be "an identical copy" of his 2008 complaint (J.A. 75) in a new docket ("*Carter 2010*"). The district court dismissed that complaint, holding that *Carter 2008* (then still pending on appeal) served as an independent first-to-file bar. Pet. App. 5a-6a; J.A. 100. Carter tactically dismissed his *Carter 2008* appeal and, in June 2011, filed a third copy of his complaint ("*Carter 2011*"), which was "identical to the

complaint filed in [*Carter 2010*] and [*Carter 2008*] except for its title, case number, and signature block." J.A. 221; Pet. App. 6a. The government again declined to intervene. J.A. 155-156.

The district court dismissed *Carter 2011* with prejudice. The court reasoned that yet another related *qui tam* action (this one in Maryland, see J.A. 571) was pending when *Carter 2011* was filed. And by this time, nearly all of Carter's claims were barred by the FCA's six-year statute of limitations. Pet. App. 64a, 74a-75a.

The district court expressed skepticism that the WSLA applies to civil claims because the term "offense" denotes criminal wrongdoing. Pet. App. 68a. But the court found it unnecessary to reach that issue, noting that in all but one of the handful of cases applying the WSLA to civil claims (mostly from the 1950s), the United States was a party. *Id.* at 71a. The court analogized to circuit precedent holding that the FCA's discovery rule, 31 U.S.C. §3731(b)(2), applies only when the United States is a party, based in part on the "practical difficulties" that arise from tolling private claims. Pet. App. 72a-75a.

2. A sharply divided panel of the Fourth Circuit reversed, with each judge writing separately. Pet. App. 1a-46a.

a. The majority held that the WSLA applies to all civil fraud actions, relying on the 1944 deletion of the words "now indictable under any existing statutes." 58 Stat. 667. Because Congress "did not include any [other] limiting language" to replace the deleted text, the panel inferred that "Congress * * * chose for the

Act to apply" to civil claims. Pet. App. 14a. The majority rejected the argument that the WSLA applies only to actions in which the United States is a party, holding that "whether the suit is brought by the United States or a [private] relator is irrelevant." *Id.* at 15a. The majority believed that tolling civil claims by private plaintiffs serves the WSLA's general "purpose" of "root[ing] out fraud against the United States during times of war." *Id.* at 16a.

The panel majority took an equally expansive view of the duration of tolling. It acknowledged that the phrase "[w]hen the United States is at war" "may appear unambiguous" in requiring a formal declaration of war, and did not dispute that the statute required formalities to *end* tolling. Pet. App. 10a. But although the WSLA was enacted against the backdrop of formally declared wars, the court concluded that no formal declaration was required, saying that such an interpretation was "unduly formalistic" and "ignore[d] the realities of today." *Id.* at 11a. Instead, the panel invoked the asserted "purpose of the WSLA" to toll the statute for an undefined class of "circumstances * * * in which fraud can easily be perpetuated against the United States," including times when the President has "power to enter into armed hostilities." *Id.* at 12a. The panel thus held that the statute of limitations on Carter's claims had been tolled since at least Congress's October 2002 authorization for the use of military force in Iraq, and would remain tolled until years after the President or Congress eventually proclaimed a formal "termination of hostilities." *Id.* at 9a-13a.

b. The panel recognized that Carter's current claims were "barred" by earlier *qui tam* cases that were pending when he filed his complaints. Pet. App. 20a-21a. But the panel held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." *Id.* at 22a. Because the earlier actions had been dismissed, nothing prevented "Carter from filing an[other] action." *Ibid.*[4]

c. Judge Agee dissented in part, concluding that the WSLA does not apply to civil *qui tam* cases in which the United States is not a party. Pet. App. 31a (Agee, J., concurring in part and dissenting in part). In his view, tolling "could only be logically applied * * * to an action brought by the United States, not by a private relator," *id.* at 37a, because "the primary concern" animating the WSLA was "the ability of [federal] law enforcement to effectively police fraud against the government during the fog of war," when it is "busily engaged" enforcing "the espionage, sabotage, and other laws." *Id.* at 40a-41a. Because private relators face no similar resource constraints, Judge Agee concluded that tolling their claims would "directly thwar[t]" the FCA's purpose of "combat[ing] fraud quickly." *Id.* at 43a, 45a. The panel's holding, Judge Agee explained, gives relators incentive to delay suit to maximize recovery by letting claims accrue. *Id.* at 44a. Judge Wynn concurred separately to dispute Judge Agee's conclusions. *Id.* at 23a-31a. The Fourth Circuit denied KBR's timely petition for rehearing en banc.

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[4] The panel remanded for the district court to consider KBR's arguments under the public-disclosure bar. Pet. App. 22a.

d. While KBR's petition for certiorari was pending, the district court took additional briefing and argument on KBR's public-disclosure bar argument, 31 U.S.C. §3730(e)(4), an alternate basis to dismiss with prejudice. The district court concluded that although Carter's fraud allegations had been publicly disclosed before he filed his complaint, J.A. 242, his claims were not "based upon" those disclosures and he qualified as an "original source." Thus, the court denied KBR's public-disclosure motion. Bound by the panel decision, the district court dismissed Carter's complaint without prejudice under the first-to-file bar. J.A. 243.

Four days later, Carter filed a *fourth* copy of his complaint, again essentially "identical to [his] prior pleadings." Mem. Op. 6-7, *United States ex rel. Carter* v. *Halliburton Co.*, No. 1:13-cv-1188 (E.D. Va. May 2, 2014), ECF No. 30. The government again declined to intervene. KBR moved to dismiss on first-to-file grounds. After months of additional briefing and argument—and while lamenting the case's "recurring appearance before the [court]" and "arduous" procedural history—the district court again dismissed (without prejudice) because *Carter 2011* remains "pending" before this Court. *Id.* at 2, 17.

SUMMARY OF ARGUMENT

1. The WSLA's plain text, history, and purpose; the contemporaneous understanding of all three branches of government; and this Court's repeated admonition that it be "narrowly construed," *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953); all demonstrate that the WSLA applies only to criminal

cases. The natural and uniform meaning of the word "offense" in the limitations chapter of the criminal code is "a crime," and Congress tailored the WSLA to the criminal statute of limitations.

All agree that from its 1921 enactment (as a statute "relating to limitations in criminal cases") until the Contract Settlement Act of 1944, the WSLA applied exclusively to criminal frauds. Nothing in the 1944 amendment reflects an intent to expand the statute to civil frauds. To the contrary, it addressed the WSLA in a section titled "prosecution of fraud," and four years later, Congress included the WSLA in title 18's comprehensive codification of criminal statutes, which simultaneously classified *all* "offense[s]" as either felonies or misdemeanors. Both the Office of Contract Settlement (established to administer the 1944 act) and the Solicitor General contemporaneously interpreted the 1944 WSLA as limited to crimes.

The unremarked deletion in 1944 of the words "now indictable" did not fundamentally transform this criminal tolling provision. That language ensured the WSLA would not revive criminal charges whose limitations had expired, and it was deleted as redundant in 1944. Congress used far more explicit language to toll civil causes of action. This reading aligns with the WSLA's purpose: to extend the time for criminal prosecutions when law enforcement officials are preoccupied with wartime duties. It is particularly inappropriate to apply the WSLA to *qui tam* actions, because the FCA contains a detailed limitations scheme that includes an absolute 10-year statute of repose, inconsistent with indefinite tolling.

The WSLA's reference to "war," in a statute enacted during and in response to two declared wars, requires a formal declaration, even if modern usage might include other military conflicts. The "dire" practical consequences of the panel's interpretation, under which tolling could extend back a decade or more (and may continue indefinitely), demonstrate that Congress could not have intended such results.

2. Under the plain language of the first-to-file bar, once "a person brings an action," "no person other than the Government may * * * bring a related action based on the facts underlying the pending action." The text is exception free and contains no temporal limitation. In this context, the word "pending" is referential, distinguishing between the earlier- and later-filed actions. This reading is consistent with the first-to-file bar's origin in the 1986 amendments, which serve the twin goals of encouraging prompt disclosure of valuable information about fraud, while discouraging opportunistic plaintiffs who do not contribute to the government's knowledge of, or ability to pursue, fraud. Congress has spoken far more clearly when intending to create a "one-case-at-a-time" rule.

This reading accords with the public disclosure bar and its "original source" exception. The first-to-file and public-disclosure bars apply to overlapping but distinct categories of cases and in different procedural postures. The weight of case law and scholarly opinion rejects the panel's atextual temporal limitation on the first-to-file bar. The one-case-at-a-time rule undermines the bar's purpose by creating incentives to delay filing and disclose information piecemeal, and interferes with resolution of earlier-filed

suits, without protecting defendants from repetitive suits.

ARGUMENT

I. THE WARTIME SUSPENSION OF LIMITATIONS ACT DOES NOT APPLY TO THIS CIVIL CASE

By extending the WSLA to civil fraud claims in a manner that effectively ensures indefinite tolling, the panel's decision conflicts with the WSLA's plain text, history, and purpose, the government's understanding at the time of the statute's enactment, and this Court's decisions "narrowly construe[ing]" that provision as "an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law." *Bridges*, 346 U.S. at 215-216.

A. The WSLA's Text, History, And Purpose Limit Its Application To Criminal Cases

1. *Text.* At times relevant here, the WSLA provided that "[w]hen the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress." 18 U.S.C. §3287 (2006).[5] In hold-

[5] The parties disagree about whether the 2008 WSLA amendments apply, given that the complaint was filed in 2011 but alleges conduct from 2005. While broadening the tolling trigger to include "a specific [Congressional] authorization for

ing that the WSLA applies to civil cases, including those brought by *qui tam* relators, the panel ignored the statute's plain text and context, which limit its application to criminal cases.

The panel disregarded the ordinary meaning of the word "offense"—i.e., "[a] violation of the law; a crime." *Black's Law Dictionary* 1110 (8th ed. 2004). Indeed, "[t]he terms 'crime,' 'offense,' and 'criminal offense' are all said to be synonymous, and ordinarily used interchangeably." 22 C.J.S. *Criminal Law* §3 (1989); accord *American Heritage Dictionary* 1255 (3d ed. 1992) (defining "offense" as "[a] transgression of law; a crime").

When Congress undertook a comprehensive codification of the nation's criminal laws in 1948, soon after the 1944 amendments on which the panel heavily relied, it placed the WSLA in title 18, which "codifies the federal criminal laws." *Pennsylvania* v. *Nelson*, 350 U.S. 497, 519 (1956); cf. *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997) ("Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, instead of the criminal code.").[6] The WSLA is within the criminal

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the use of the Armed Forces," and lengthening the period "until 5 years after the termination of hostilities," nothing in the 2008 amendments suggests that the WSLA applies to civil cases.

[6] That year, Congress undertook a parallel recodification of the Judicial Code in title 28, collecting *civil* statutes of limitation without any suggestion of wartime tolling. *See* Pub. L. No. 80-773, 62 Stat. 869, 911, 971, 974 (1948) (collecting the six-year statutes of limitations on actions against the United States or for breach of marshal's bond (§§544, 2401) and five-year limitation on actions for a "civil fine, penalty, or forfeiture" (§2462)); see also *Hearing on H.R. 1600 and H.R. 2055 Before the Sub-*

code's chapter on "limitations," which has long divided "offenses" into two obviously criminal categories—"capital" and "not capital"—and *every* use of the word "offense" references a crime. 62 Stat. 827-828; 18 U.S.C. §§3281-3301.

Many of the WSLA's neighboring provisions would make no sense if "offense" were read to include civil violations. *E.g.*, 18 U.S.C. §3282(a) ("no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed"). Under normal interpretative principles, limiting the WSLA's use of "offense" to crimes "is reinforced by the fact that the [term] * * * appears elsewhere in the [chapter] in contexts in which it cannot bear the meaning placed on it by [the panel]." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992). And the chapter's uniform usage of "offense" confirms that the word should not be given a special, and far broader, meaning in the WSLA. Cf. *Robers* v. *United States*, 134 S. Ct. 1854, 1857 (2014) ("Generally, identical words used in different parts of the same statute are * * * presumed to have the same meaning." (internal quotation marks omitted)).[7]

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comm. No. 1 of the H. Judiciary Comm., 80th Cong. 2709 (1947) discussing parallel criminal and civil recodification efforts).

[7] In opposing certiorari, the government could identify no other current title 18 provision that uses "offense" to describe a civil violation. Its only example was 93 years old, see Br. for the U.S. as *Amicus Curiae* Opposing Cert. 9 (citing *United States* v. *Hutto*, 256 U.S. 524 (1921)); even that statute was later amended to indicate that "offense" means only crimes, by classifying less

Limiting the WSLA to criminal offenses accords with the provision's structure, which creates symmetry between the post-hostilities limitations period and the general criminal statute of limitations. The 1944 WSLA suspended limitations "until three years after the termination of hostilities," 58 Stat. 667, at a time when the general criminal statute of limitations was also three years, 18 U.S.C. §582 (1940 ed.). Accord 62 Stat. 828 (same under 1948 WSLA); 18 U.S.C. §582 (1946 ed.). Congress recently amended the WSLA to "exten[d] the statute of limitations to five years after the end of a conflict, making the law consistent with the current statute of limitations for criminal fraud offenses." S. Rep. No. 110-431, at 2 (J.A. 198); 18 U.S.C. §3282(a).

No such symmetry exists for civil frauds. Until Congress enacted 28 U.S.C. §1658 in 1990 (Pub. L. No. 101-650, 104 Stat. 5114) to provide a general statute of limitations for federal causes of action, "the controlling period would ordinarily be the most appropriate one provided by state law." *Johnson* v. *Ry. Express Agency, Inc.*, 421 U.S. 454, 462 (1975); see also David D. Siegel, *The 1990 Enactment of a Uniform Statute of Limitations on Federal Claims*, West Practice Commentary to 28 U.S.C. §1658 (noting "the vacuum left by the absence of specific statutes of limitations" for federal claims). Although the FCA specifies a limitations period, it is *six years*, see 31 U.S.C. §235 (1946 ed.), not three. And the limitation on actions for a civil "penalty or forfeiture" was *five* years. 28 U.S.C. §791 (1940 ed.) (now codified at 28 U.S.C.

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serious "offense[s]" as "misdemeanors." *Id.* at 10 n.3 (citing 18 U.S.C. §371).

§2462). Nothing in the WSLA or its history suggests an intent to *shorten* the default period for FCA or penalty proceedings once hostilities ceased—or to establish a uniform limitations period for civil frauds only during wartime, while failing to address the "void" of limitations periods otherwise "commonplace in federal statutory law." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483 (1980).

2. *History*. From the WSLA's first enactment in 1921 until at least the Contract Settlement Act of 1944, it clearly applied exclusively to criminal fraud. See Br. for the U.S. as *Amicus Curiae* Opposing Cert. ("U.S.Cert.Br.") 11. The 1921 provision explicitly "relat[ed] to limitations in criminal cases" and modified the general three-year period in which a person could be "prosecuted, tried, or punished, for any offense, not capital," tolling only fraud "offenses * * * now indictable under any existing statutes." 42 Stat. 220.[8]

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[8] The legislative history of the 1921 act contains no indication that civil statutes would be tolled. A House Report noted the Justice Department's ongoing "investigation * * * of various alleged offenses, consisting largely of [wartime] frauds against the Government," and that the need for detailed investigation meant that "a considerable period must elapse before * * * the department may know whether *prosecutions* are justified." H.R. Rep. No. 67-365, at 1 (1921) (emphasis added). It emphasized that tolling would allow the government "not only to make an investigation, but thereafter to begin the necessary *prosecutions*." *Id.* at 2 (emphasis added); accord 61 Cong. Rec. 7060-7061, 7640 (1921). The Report also discussed the Solicitor General's analysis of "ex post facto" limitations on reviving an expired criminal limitations period. H.R. Rep. No. 67-365, at 2. Six years later, Congress repealed the 1921 Act after "the Department of Justice announced * * * that it did not propose to

The 1942 Act "reviv[ed] for World War II substantially the same exception to the general [criminal] statute of limitations which, from 1921 to 1927, had been directed at the war frauds of World War I." *Bridges*, 346 U.S. at 217. It reenacted the text of the 1921 law almost verbatim, and expressly applied only to criminal fraud "offenses" "now indictable under any existing statutes." 56 Stat. 747-748. Committee reports discussed the 1921 predecessor at length, reiterating its goal of preventing "offenses" from becoming "barred from prosecution." S. Rep. No. 77-1544 (1942); H.R. Rep. No. 77-2051 (1942).

When Congress amended the WSLA in the Contract Settlement Act of 1944, it reused the earlier text, under a section titled "PROSECUTION OF FRAUD" which also created a new criminal offense for destruction of records. 58 Stat. 667. The 1944 Act replaced a fixed 1945 end date (56 Stat. 748) with tolling until "three years after the termination of hostilities in the present war," consistent with the general criminal statute of limitations. And it expanded covered "offense[s]" to include those "committed in connection with" contracts "related to the prosecution of the present war." 58 Stat. 667. While the Act deleted the phrase "now indictable under any existing statutes," it elsewhere specified that the tolling "shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet run." *Ibid.*

Nothing in the 1944 statutes or their legislative history reflects any intent to transform what had

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attempt any further prosecution of" alleged "war frauds," the "offenses giving rise to the statute." H.R. Rep. No. 70-16, at 1 (1927).

been uniformly understood as a *criminal* tolling provision to apply expansively to all civil frauds. *Bridges* described the 1944 amendments as "insert[ing] * * * more specific references to war contracts and to the handling of property under the Surplus Property Act of 1944," 346 U.S. at 217 n.15, with no reference to civil tolling. The same is true of the Contract Settlement Act's extensive legislative history.[9]

Four years later, when Congress comprehensively recodified the criminal law to "mak[e] it easy to find the criminal statutes," 94 Cong. Rec. 8721 (1948), it placed the WSLA in the new criminal code's chapter on "limitations," confirming the statute's continued criminal purview. 62 Stat. 828; accord S. Rep. No. 80-1620, at 2427 (1948) (legislation's purpose was "to codify and revise the laws relating to Federal crimes and criminal procedure"). Cf. *Hendricks*, 521 U.S. at 361. At the same time, Congress confirmed that "offense" described only crimes, consistent with the term's contemporaneous meaning. See *Black's Law Dictionary* 1232 (4th ed. 1951) ("A crime or misdemeanor; a breach of the criminal laws."). Congress

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[9] See, *e.g.*, H.R. Rep. No. 78-1708 (1944) (Conference Report); S. Rep. No. 78-836, at 5 (1944) (penalty language "supplement[s] the provisions contained in the criminal code"); 90 Cong. Rec. 6060 (1944) (statement of Rep. Gwynne) (bill's penalty provisions, including suspension of limitations, "written in accordance with the old-fashioned criminal rules"); *id.* at 6111 (statement of Rep. Sumners) ("The Judiciary Committee reported legislation extending the statute of limitations as to these war frauds so that those guilty of such fraud would not escape because of the confusion incident to the war."); accord Edmund Webster Burke, *War Contract Termination: The Contract Settlement Act of 1944*, 23 Chi.-Kent L. Rev. 107, 148 (1945).

divided offenses into two strictly criminal categories: Capital crimes and those punishable by more than a year in prison were felonies, and "*any other* offense is a misdemeanor," 62 Stat. 684 (emphasis added) (codified at 18 U.S.C. § 1) (repealed 1984).

Federal courts viewed the post-1944 WSLA as "substantially the same as" the original (exclusively criminal) 1921 statute. *United States* v. *Obermeier*, 186 F.2d 243, 256 & n.60 (2d Cir. 1950); accord *Marzani* v. *United States*, 168 F.2d 133, 136 (D.C. Cir. 1948) (language "the same as" 1921 "predecessor"). And in the years following the 1944 amendments, the Executive Branch understood the WSLA to be a criminal provision. The Office of Contract Settlement—the agency Congress created to administer the Contract Settlement Act, see 58 Stat. 651—explained that under the 1944 Act, "[t]he running of statutes of limitation *on criminal prosecutions* was suspended until three years after the war." Office of Contract Settlement, *A History of War Contract Terminations & Settlements* 19 (July 1947) (emphasis added), *available at* http://goo.gl/lpQMFC.

And at a time when the government had been litigating WSLA cases continuously since its enactment, the Department of Justice represented to this Court that although the 1944 amendments suspended "limitations on *criminal* violations of the Surplus Property Act," "[b]y contrast, Congress provided no suspension of limitations on *civil* actions under Section 26 [of the Act]." U.S.Br. 8, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362) ("*Koller* U.S.Br.") (emphasis added). The *Koller* brief contrasted the Surplus Property Act's criminal and civil provisions in arguing that civ-

il provisions were compensatory and thus (at that time) subject to *no* statute of limitations. And the brief specifically discussed the sequence of enactments resulting in the WSLA's then-current wording and how the 1944 amendments changed the text. *Id.* at 26-27.

The same understanding was evident at the time of the 2008 amendments. The Senate Judiciary Committee described the legislation's purpose as "protect[ing] American taxpayers from *criminal* contractor fraud by giving investigators and auditors the time they need to thoroughly review contracts related to the ongoing conflicts in Iraq and Afghanistan." S. Rep. No. 110-431, at 1-2 (emphasis added) (J.A. 198). It described the 1940s statutes as having "extended the time prosecutors had to bring charges relating to criminal fraud offenses," and explained that the 2008 amendments would make the WSLA "consistent with the current statute of limitations for criminal fraud offenses." *Id.* at 2; see also *id.* at 2 n.2 (citing 1946 criminal indictment as example of WSLA being a "vital" tool for "prosecutors" to "pursue[] war profiteers").

3. *Purpose.* The panel's expansive interpretation of the WSLA is also irreconcilable with this Court's understanding of the Act's purpose—to extend the time for criminal prosecutions. In *Bridges*, this Court explained that the WSLA "sought to help safeguard the treasury from [wartime] frauds by increasing the time allowed for their discovery and *prosecution*." 346 U.S. at 218 (emphasis added). Noting that "Congress was concerned with the exceptional opportunities to defraud the United States that were inherent

in its gigantic and hastily organized procurement program," *Bridges* explained that in wartime, "[t]he law-enforcement branch of the Government is * * * busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws." *Id.* at 218, 219 n.18 (quoting S. Rep. No. 77-1544, at 2). For that reason, "the present 3-year [criminal] statute of limitations may [not] afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government." *Ibid.*

Bridges further explained that the 1944 WSLA "readopt[ed]" the policy of its World War I predecessor: to extend the "general *criminal* statute of limitations" for fraud claims. 346 U.S. at 218-218 & n.18. The Court cautioned that "[t]he purpose of the [WSLA] is *not* that of generally suspending the three-year statute, *e.g.*, in cases of perjury, larceny, and like crimes," but rather *only* for cases of "fraud against the Government" "in view of the difficulty of their prompt discovery and prosecution." *Id.* at 222 (emphasis added).

Similarly, *United States* v. *Smith*, 342 U.S. 225, 230 (1952), declined to "suspend the running of the statute beyond the emergency which made the suspension seem advisable," and thus refused to cover crimes committed after hostilities ceased. The Court viewed the statute as reflecting a "fear * * * that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the *crimes of fraud* perpetrated against the United States would be forgotten until it was too late." *Id.* at 228-229 (emphasis added). Justice Clark's concurrence empha-

sized that "Congress intended to give the Department [of Justice] more time to apprehend, investigate, and prosecute offenses." *Id.* at 230 (Clark, J., concurring).

B. The Unremarked Deletion Of The Words "Now Indictable" Did Not Fundamentally Transform A Criminal Tolling Provision

1. In extending the WSLA to civil cases, the panel relied almost exclusively on the 1944 deletion of the phrase "now indictable under any existing statutes." Pet. App. 8a, 13a-14a. And the government has, with the benefit of hindsight—and billions in potential FCA revenues[10]—recently abandoned its contrary historical understanding and embraced that position. See U.S.Cert.Br. 11. That view is plainly wrong.

This Court construed identical "now indictable" language in the WSLA's predecessor as serving to limit tolling "to offenses * * * not already barred." *United States* v. *McElvain*, 272 U.S. 633, 637 (1926). That language simply ensured that the WSLA would not revive criminal charges whose statutes of limitations had lapsed, a constraint Congress recognized since its earliest efforts at wartime tolling; indeed, Congress likely included such language because the Solicitor General had warned against reviving expired claims before the 1921 enactment. See note 8, *supra*; H.R. Rep. No. 67-365, at 2 (1921) (discussing *ex post facto* limitations). Because the 1944 statute had a prospective focus (extending tolling to "three

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[10] See, *e.g.*, Dep't of Justice, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (Dec. 20, 2013).

years after the termination of hostilities," 58 Stat. 667) and because limitations had been tolled since 1942, *ex post facto* concerns would have been less prominent. Moreover, the "now indictable" language was unnecessary because the 1944 statute included other language to address that purpose, specifying that "[t]his section * * * shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law." 58 Stat. 667. Congress likely deleted the language as redundant.

There is no need to guess how Congress would have drafted a tolling provision for both criminal and civil matters: It did so two months after enacting the WSLA. That provision tolled not "offenses," but rather "*violations* of the antitrust laws * * * now indictable *or subject to civil proceedings*." Act of Oct. 10, 1942, ch. 589, 56 Stat. 781 (emphasis added). The idea that Congress would transform an exclusively criminal tolling provision into one encompassing all civil frauds through the ambiguous step of deleting two words—without any other reference in statutory text or legislative history—runs counter to the rule that "Congress * * * does not alter the fundamental details of a [statutory] scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) *Wimberly* v. *Labor & Indus. Relations Comm'n of Mo.*, 479 U.S. 511, 518-519 (1987) (Congress does not "transform the scope" of legislation through a minor and ambiguous textual change—particularly for a statute this Court has repeatedly directed be "narrowly construed").[11] It is

[11] The government has argued that the 1944 amendments were part of a larger statute that was "largely civil in nature," and

particularly implausible that Congress, in enacting "one of the most carefully considered pieces of legislation ever to have been enacted by Congress" (Sen. James E. Murray, *Contract Settlement Act of 1944*, 10 Law & Contemporary Probs. 683, 683 (1944)), would have undertaken such a radical expansion of wartime tolling without any comment.[12]

Construing the 1944 Act to tacitly extend the WSLA to civil actions is inconsistent with contemporaneous Executive Branch practice, Congress's decision to include it in the criminal code's limitations chapter, and its decision to define "offense" in title 18 to include only crimes. See pp. 19-27, *supra*. Moreo-

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reflected a purpose "to better protect the government from [contracting] fraud." U.S.Cert.Br. 11-12. But the criminal nature of "offense" in the WSLA is confirmed by the title of the relevant section of the Contract Settlement Act: "PROSECUTION OF FRAUD," § 19(b), 58 Stat. 667. And this Court characterized the 1944 Act as extending the WSLA to "offenses of the type likely to be committed during the post-hostilities period." *Smith*, 342 U.S. at 227-228; accord *Koller* U.S.Br. 26-27 (Surplus Property Act added "criminal prosecutions for violations of the Surplus Property Act * * * to the list of *prosecutions*" covered by the WSLA (emphasis added)).

[12] Alternatively, the "now indictable" language may have reflected the Solicitor General's concern in 1921 that "care should be taken that the amendatory statute should be clearly made to apply to offenses already committed" because of courts' "tendency * * * to hold that the amendatory statutes are prospective and that it was not the legislative intent to make them apply to crimes already committed." H.R. Rep. No. 67-365, at 2. By 1944, there was an established practice of applying the WSLA to already-committed crimes, and the 1944 statute's prospective focus (authorizing tolling until "three years after the termination of hostilities," 58 Stat. 667) reduced the significance of crimes already committed.

ver, under the government's own view, extending the WSLA to civil frauds was unnecessary for the government to protect its interests. During the post-war era, the government took the position that *no statute of limitations applied* to compensatory civil suits brought by the government (as opposed to actions for penalties or forfeitures, 28 U.S.C. §2462), unless Congress had provided otherwise. See *Koller* U.S.Br. 8, 28-29; *E.I. DuPont DeNemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924) (action by the United States "is subject to no time limitation, in the absence of congressional enactment clearly imposing it").

2. Moreover, the panel's maximalist reading conflicts with this Court's admonitions that the WSLA must "be construed strictly, and held to apply only to cases shown to be clearly within its purpose." *McElvain*, 272 U.S. at 639. In rejecting one attempt to expand wartime tolling beyond the statutory text and purpose, *Bridges* explained that because "[t]he [WSLA] creates an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law," it must be "'narrowly construed.'" 346 U.S. at 215-216 (quoting *United States* v. *Scharton*, 285 U.S. 518, 521-522 (1932)). This Court understood the Act's history and origin to "emphasiz[e] the propriety of its conservative interpretation," and found no congressional "purpose to swallow up the three-year limitation to the extent necessary to reach" the government's expansive position in that case. *Id.* at 216.

Smith similarly refused to "strai[n] the language of the [WSLA]" to expand tolling to crimes committed after hostilities ended. 342 U.S. at 229-230. The

Court declined to rely on policy considerations to "alte[r] * * * the statutory scheme." *Id.* at 228-229. Earlier decisions are to the same effect. *E.g.*, *Scharton*, 285 U.S. at 522 ("liberally interpreted in favor of repose"); *United States* v. *Noveck*, 271 U.S. 201, 204 (1926) (no WSLA tolling "unless the purpose so to do is plain"); accord *United States* v. *Klinger*, 199 F.2d 645, 646 (2d Cir. 1952) (L. Hand, J.) (rejecting an interpretation of the WSLA that would "more than doubl[e] the existing period of limitation," which "Congress certainly would not have tolerated"); *Bridges*, 346 U.S. at 221 (1942 reenactment of WSLA "carried with it" this Court's decisions interpreting the 1921 provision).

The panel's approach cannot be reconciled with "narro[w] construc[tion]," because it bypasses narrower readings of the WSLA that avoid a dramatic expansion of tolling. Most notably, the panel could have given "offense" its ordinary meaning (a crime), consistent with the WSLA's codification in title 18 and its historical purpose of accommodating wartime law-enforcement burdens. See, *e.g.*, S. Rep. No. 110-431, at 1-2 (J.A. 198-199); *Smith*, 342 U.S. at 228-229 (noting "fear" that "crimes of fraud * * * would be forgotten until it was too late").

3. The panel also erred by relying on a handful of lower-court cases, mostly from the 1950s, applying the WSLA to civil claims. Pet. App. 14a.

As the panel acknowledged, *United States* v. *Weaver*, 107 F. Supp. 963, 965-966 & n.7 (N.D. Ala. 1952), interpreted the post-1944 WSLA, and held that because "the history of the [statute] from its genesis * * * is persuasive to the conclusion that the

Congress intended only to toll the running of existing statutes of limitations as a bar to criminal prosecutions," it "ha[d] no effect upon" civil statutes of limitations. In reversing on an alternate ground (that the statute of limitations for penalties was inapplicable), the Fifth Circuit did not revisit the district court's WSLA interpretation. See *United States* v. *Weaver*, 207 F.2d 796, 798 (1953).

Nothing in the handful of lower-court decisions applying the WSLA to civil claims warrants a contrary result. The two court of appeals decisions to suggest (or assume) the WSLA applies to civil claims did so without acknowledging the possibility it would be limited to criminal cases, or analyzing the authorities discussed above. See *United States* v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954).[13] The principal holding of *United States ex rel. McCans* v. *Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), is irrelevant: the court lacked "'jurisdiction to proceed'" because the suit was "based upon 'evidence or information in the possession of the United States' at the time the suit was brought." *Id.* at 549 (quoting 31 U.S.C. §232(C) (1952 ed.)). *McCans* separately concluded, in the alternative, that the civil claims were untimely even *with* WSLA tolling. *Id.* at 551. Any statement about applying the WSLA in the civil context was thus doubly

[13] *United States* v. *Hougham*, 270 F.2d 290, 292 & n.3 (9th Cir. 1959) held that the government's claims were not subject to any statute of limitations; in a footnote, it suggested in dicta that the claims would have been timely if tolled.

dicta, and unlitigated to boot: The defendant had "concede[d]" the WSLA's applicability. *Id.* at 551.[14]

C. Indefinite Tolling Is Particularly Inappropriate For *Qui Tam* Actions

The panel's extension of WSLA tolling to *qui tam* claims is also irreconcilable with the FCA's express limitations provisions—and with the WSLA's recognized purposes.

The FCA imposes a general six-year limitation period. It allows tolling of suits by the United States alone for three years after material facts "are known * * * by the [responsible] official of the United States," but provides that an FCA action may be brought "*in no event* more than 10 years after the date on which the violation is committed." 31 U.S.C. §3731(b) (emphasis added). This Court recently described this provision as an "absolute provision of repose." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013).

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[14] The main holding of *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 598-600 (S.D. Tex. 2012), is also irrelevant: that fact questions remained regarding the FCA's three-year discovery rule. In applying the WSLA to the government's civil claims, the court relied heavily on 1950s cases and the deletion of "now indictable," without considering many of the textual and historical arguments discussed *supra*. Accord *United States* v. *Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955). *Dugan & McNamara, Inc.* v. *United States*, 127 F. Supp. 801, 803-804 (Ct. Cl. 1955), declined to consider the relevance of the 1948 recodification, because tolling under the 1944 act was sufficient. Other cases simply did not consider whether the WSLA applies to civil suits. *E.g.*, *United States* v. *Murphy-Cook & Co.*, 123 F. Supp. 806 (E.D. Pa. 1954).

"Statutes of repose * * * generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014). But without explaining why tolling a "statute of limitations" also extended a statute of repose, see Pet. App. 8a-16a, the panel held that the WSLA has already tolled fraud claims for more than a decade (i.e., since 2002), and indeed, the opinion identifies no principle limiting its application to Operation Iraqi Freedom. To the contrary, the panel's reasoning may support tolling since the beginning of U.S. operations in Afghanistan (i.e., 2001) or even Operation Desert Storm (1991). Pet. App. 10a-13a; see also *id.* at 29a (Wynn, J., concurring) (concluding that "extended or indefinite limitations period is warranted"). The panel thus effectively allowed the WSLA's general criminal-code tolling provision to supersede the FCA's specific mandate that claims be brought "in no event more than 10 years" after the alleged violation, 31 U.S.C. §3731(b)(2). Contra *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 ("[I]t is a commonplace of statutory construction that the specific governs the general.").

Indefinite tolling conflicts with *Gabelli*'s concern about requiring defendants to face liability "not only for [six] years * * *, but for an additional uncertain period into the future." "'[E]xtend[ing] the limitations period to many decades,'" *Gabelli* explained, was "'beyond any limit that Congress could have contemplated'" and would "'thwar[t] the basic objective of repose underlying the very notion of a limitations period.'" 133 S. Ct. at 1223 (quoting *Rotella* v. *Wood*,

528 U.S. 549, 554 (2000)). *Gabelli* is consistent with other courts' conclusion that "Congress certainly would not have tolerated" using the WSLA to transform so radically the ordinary limitations period. *Klinger*, 199 F.2d at 646 (L. Hand, J.).

Congress's failure to address the WSLA's interaction with the FCA's statute of limitations is a strong indication that wartime tolling applies only in criminal cases. There is no evidence Congress anticipated wartime tolling when it enacted the FCA's current statute of limitations in 1986, which modified the historical six-year period to provide a discovery rule for claims brought by the United States, and imposed a 10-year absolute repose provision. A House Report explained pointedly that "the Committee did not intend to allow [even] the Government to bring fraud actions *ad infinitum*, and therefore imposed the strict 10 year limit on [FCA] cases." H.R. Rep. No. 99-660, at 25 (1986); accord *id.* at 32. And Congress's decision to add a discovery rule in 1986 reflected a different strategy for addressing the government's lack of resources to investigate fraud promptly, again suggesting WSLA tolling was not available.

To grant *private* plaintiffs—to whom Congress did not clearly extend even the FCA's discovery rule—indefinite WSLA tolling is particularly inconsistent with Congress's scheme. There is no indication that Congress believed private relators experience the same resource constraints during wartime as government prosecutors and investigators. Pet. App. 40a-41a. Indefinite tolling of private claims would "directly thwar[t]" the FCA's purpose of "combat[ing]

fraud quickly." *Id.* at 43a, 45a (Agee, J., concurring in part and dissenting in part).

D. The WSLA's Reference To "War" Requires A Formal Declaration

The panel also erred by holding that the WSLA's authorization of tolling "[w]hen the United States is at war," 18 U.S.C. §3287, applies without a formal declaration. Instead, the panel broadly authorized tolling in "circumstances * * * in which fraud can easily be perpetuated against the United States," including times when the President has "power to enter into armed hostilities." Pet. App. 12a.[15]

The scope of the WSLA's "at war" reference is also subject to the bedrock requirement of "narro[w] constru[ction]," *Bridges*, 346 U.S. at 215-216, and should be "held to apply only to cases shown to be clearly within its purpose," *McElvain*, 272 U.S. at 639. Thus, even if the phrase might be read, in isolation or other statutory contexts, to include non-declared military conflicts, a rule of "strict construction," *ibid.*, requires a more limited interpretation. Accord *United States* v. *W. Titanium, Inc.*, No. 08-cr-4229, 2010 WL 2650224, at *1, 3-4 (S.D. Cal. July 1, 2010) ("a narrow construction of the term 'at war' in the WSLA requires a finding that it encompasses only those wars which have been formally declared by Congress," not including conflict in Iraq).

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[15] The panel concluded that the United States was "at war" under both the pre- and post-2008 versions of the WSLA, and so did not decide which version applies and did not address the amended language referring to an "authorization for the use of the Armed Forces." Pet. App. 10a-13a.

In any event, as the panel itself acknowledged, "the meaning of 'at war'" is facially "unambiguous." Pet. App. 10a; see, *e.g.*, *United States* v. *Shelton*, 816 F. Supp. 1132, 1135 (W.D. Tex. 1993) ("[f]or the Persian Gulf conflict to have amounted to a war under 18 U.S.C. §3287, Congress should have formally recognized that conflict as a war"). Even if "contemporary usage of the term 'war' may have broadened in light of the subsequent military conflicts in Korea, Vietnam, the Persian Gulf and Afghanistan, the WSLA originated during a time of formally declared war and during a time period during which it was probably more commonly understood that the United States came to be in a state of war only through a formal declaration of war." *W. Titanium*, 2010 WL 2650224, at *4; accord *United States* v. *Anghaie*, No. 1:09-cr-37, 2011 WL 720044, at *2 (N.D. Fla. Feb. 21, 2011).[16] The WSLA was enacted in response to two formally declared world wars, and one version of the statute explicitly tied tolling to "the prosecution of the present war," 58 Stat. 667, using the term to reference a congressionally declared "war."

The panel's reading has the further defect of rendering the 2008 amendments all but meaningless: Congress's careful extension of WSLA tolling to a particular kind of authorization of the use of military force, 123 Stat 2475, would be swallowed up by the panel's expansive reading of "at war," which is used in both the pre- and post-amendment statute. Contra

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[16] Historical context thus distinguishes later-enacted statutes. See Pet. App. 11a (citing 28 U.S.C. §2416 (enacted Pub. L. No. 89-505, §1, 80 Stat. 305 (1966)) and 50 U.S.C. §1829 (enacted Pub. L. No. 103-359, tit. VIII, §807(a), 108 Stat. 3452 (1994)).

Stone v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, [courts must] presume it intends its amendment to have real and substantial effect."). The panel also ignored evidence that the 2008 amendments reflected an understanding that the "military operations in Iraq and Afghanistan" were "likely exempt from" WSLA tolling because of the absence of a formal declaration of war. S. Rep. No. 110-431, at 4 (J.A. 202) (view of Senate Judiciary Committee); *W. Titanium*, 2010 WL 2650224, at *4; see also U.S.Cert.Br. 16 ("until the WSLA was amended in 2008, there was substantial doubt whether the statute could apply absent a formal declaration of war").

Requiring a formal declaration relieves courts of the difficult and politically charged task of deciding when an undeclared conflict begins and ends. See *Shelton*, 816 F. Supp. at 1135 ("[t]he Judicial Branch of the United States has no constitutional power to declare a war"). That Congress historically did not ask courts to make such judgments is a good indication that the panel erred. Cf. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2586 (2012) ("sometimes 'the most telling indication of [a] severe constitutional problem * * * is the lack of historical precedent' for Congress's action" (quoting *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)).

Disregarding the ordinary meaning of "at war" will inevitably require "extensive post-hoc factual determinations" (*W. Titanium*, 2010 WL 2650224, at *3) on a range of issues, *e.g.*: (1) the extent of Congress's authorization for the President to act; (2) whether the

conflict is a "war" under other definitions and international law; (3) the conflict's scope; and (4) the diversion of resources away from investigating frauds. *United States* v. *Prosperi*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008) (applying these factors in concluding that United States was "at war" during Iraq and Afghanistan conflicts). That approach, like the panel's here, would "entangl[e]" the Judiciary in an "are[a] reserved for the [political] Branches," *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989).

E. "Dire" Practical Consequences Further Undermine The Panel's Rationale

The "dire effects" (Pet. App. 46a (Agee, J., concurring in part and dissenting in part)) of the panel's interpretation of the WSLA highlight the extent of its departure from a rule of "narrow construction" and demonstrate that Congress could not have intended such results.

Although this case involves the conflict in Iraq, the panel's analysis suggests that even earlier conflicts may have triggered ongoing tolling. The first Persian Gulf War, for instance, was initiated by a congressional authorization for the use of military force, not a formal declaration of war, see Pub. L. No. 102-1, 105 Stat. 3 (1991), and ended with a cease-fire memorialized in communications to the U.N. Security Council, see U.N. Doc. S/22485 (Apr. 11, 1991), not a presidential proclamation or concurrent resolution. See, *e.g.*, Barbara Salazar Torreon, Cong. Research Serv., RS21405, *U.S. Periods of War and Dates of Current Conflicts* 5-6 (2012) (noting lack of "official end date" for Persian Gulf War). There is no reason

the panel's logic could not be extended back another decade or more. And because the WSLA does not textually limit its sweep to claims involving defense contracting or the war effort, the panel's decision will be (and already has been) cited to revive time-barred private claims in cases having "nothing to do with [any] war," *Smith*, 342 U.S. at 230 (Clark, J., concurring), from financial institutions to healthcare providers to medical implement- or drug-makers.[17]

While the panel relied on a vague "purpose"-based interpretation of the requirements to *begin* tolling, it strictly enforced the statute's textual formalities for *ending* tolling. That asymmetry virtually ensures indefinite tolling, and ignores that the President and Congress have little incentive to disclaim wartime powers or to end undeclared hostilities in the formal way contemplated in the WSLA, particularly as tolling "is at most a tertiary consideration" (App. 26a (Wynn, J., concurring)) in times of armed conflict. That is particularly true for the conflict against al Qaeda, which arguably preceded the attacks of September 11, 2001, and shows no signs of abating. The necessary implication of the panel's reading is to deny those who contract with the government the fundamental interests in repose. And it requires contractors to indefinitely preserve records of long-ago

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[17] *E.g.*, *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593 (S.D.N.Y. 2013) (invoking WSLA to toll fraud claims against bank); *United States ex rel. Carroll* v. *Planned Parenthood Gulf Coast, Inc.*, Civ. No. H-12-3505, 2014 WL 1933554, at *7 (S.D. Tex. May 14, 2014) (family planning clinic); *United States ex rel. Paulos* v. *Stryker Corp.*, Civ. No. 11-0041-CV-W-ODS, 2013 WL 2666346, at *15 (W.D. Mo. June 12, 2013) (medical device manufacturer).

events and transactions and subjects them to the ongoing risk of suit by the government or self-interested relators at a distance of any number of years.

II. THERE IS NO BASIS FOR THE FOURTH CIRCUIT'S ATEXTUAL ONE-CASE-AT-A-TIME RULE

Compounding the practical effects of indefinite wartime tolling, the panel eviscerated the FCA's "first-to-file" bar, 31 U.S.C. §3730(b)(5), allowing relators to sidestep this crucial limitation on duplicative lawsuits by re-filing a copy of their complaint after an earlier case is dismissed—or, for that matter, reduced to judgment. That reading is at odds with the statutory text, purpose, and history, which establish an "exception-free" bar, and express no intent to create the kind of unpredictable, "on-again-off-again" jurisdictional regime that the panel sanctioned.

A. The Statutory Text And History Impose No Temporal Limitation On The First-To-File Bar

1. Under the first-to-file bar, "[w]hen a person brings an action under [the FCA], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. §3730(b)(5). The plain text speaks in absolute terms: The bar applies beginning "[w]hen a person brings an action," and, from that point forward, "no person other than the Government may * * * bring a related action." The language is "exception-free," *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001). The

first-to-file bar "applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." 1 John T. Boese, Civil False Claims and Qui Tam Actions §4.03[C][2][b] (4th ed., 2012). "Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive plaintiffs from bringing related actions based on the same underlying facts. * * * To hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute." *Lujan*, 243 F.3d at 1187-1188.

In this context, the word "pending" functions referentially, "to distinguish" between the two different actions mentioned in the statute: the "earlier-filed action" (which is "pending" from the time it is filed) and any "later-filed action" (which, by definition, was not "pending" when the first-filed case was filed). *United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014). In other words, "pending" is "used as a short-hand for the first-filed action," *United States ex rel. Powell* v. *American InterContinental Univ., Inc.*, No. 1:08-cv-2277, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012). "The simplest reading of 'pending' is the referential one; it serves to identify which action bars the other." *Shea*, 748 F.3d at 343.

This reading is confirmed by the sentence's syntax, in which the phrase "'based on the facts underlying the pending action' merely clarifies 'related action.'" *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011). The word "pending"

thus imposes no time limit on operation of the bar, but rather identifies the facts which will no longer support a claim: those "underlying the pending action."[18] The bar would certainly be indefinite if it simply read, "no person other than the Government may intervene or bring a related action." It is implausible that Congress implicitly put a time limit on that bar, and created an unpredictable and shifting jurisdictional landscape, through the oblique mechanism of describing the scope of what claims are "related." Cf. *Whitman*, 531 U.S. at 468.

The panel read the first-to-file bar as if it provided that "when a person brings an action under this subsection, no person other than the Government may intervene or bring a related action, *while the first action remains pending*." *Shea*, 748 F.3d at 344. But where Congress has intended to bar suits only so long as an earlier-filed action remains pending, it has said so expressly. See, *e.g.*, 28 U.S.C. § 1500 (barring suits in the Court of Federal Claims while the plaintiff "*has pending* in any other court any suit or process against the United States" based on the same claim (emphasis added)); 42 U.S.C. § 300aa-11(a)(5)(B) (no person may bring a vaccine-related claim in the Court of Federal Claims if he or she "*has pending* a civil action for damages for a vaccine-related injury or

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[18] It is therefore not dispositive that, in isolation, "pending" can mean "[b]egun, not yet completed." *Black's Law Dictionary* 1021 (5th ed. 1979). The question is not whether the first-filed action here was "pending" at some point, but rather *when* that case needed to be "pending" to trigger the first-to-file bar, and whether the bar has an expiration date.

death" (emphasis added)); *Shea*, 748 F.3d at 338.[19] Courts have interpreted these provisions "to prevent simultaneous dual litigation." *E.g.*, *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) (en banc), aff'd, *Keene Corp.* v. *United States*, 508 U.S. 200 (1993).

Neighboring FCA provisions provide a stronger textual basis for barring an action only while another is pending. See 31 U.S.C. §3730(e)(3) (barring action "based upon allegations or transactions which *are the subject of* a civil suit or an administrative civil money penalty proceeding in which the Government *is already* a party" (emphases added)); *Shea*, 748 F.3d at 338 (Srinivasan, J., concurring in part and dissenting in part) (reading §3730(e)(3) to apply only "during pendency" of civil action or administrative proceeding). Because Congress used different language for the first-to-file bar, this Court should "presum[e] that Congress act[ed] intentionally and purposely" in that choice. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

2. This reading is also consistent with the origin of the first-to-file bar in the 1986 amendments. As noted, the FCA originally allowed relators to bring parasitic suits and claim a share of recovery even if they did nothing to expose the alleged fraud. *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical*

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[19] Cf. 8 U.S.C. §1101(a)(15)(V)(ii)(II) (defining classes of "nonimmigrant aliens" to include persons granted preferential status as a spouse or child of an alien lawfully admitted for permanent residence, so long as an application for a visa or adjustment of status "remains pending").

Labs., Inc., 149 F.3d 227, 233 (3d Cir. 1998) (citing *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943)). After the 1943 amendments eliminated "parasitical suits," *Pettis ex rel. United States* v. *Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978), the 1986 amendments sought a "golden mean" between incentives for "whistle-blowing insiders with genuinely valuable information" and discouraging "opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

The 1986 amendments evidence no intent to bar repetitive suits only while an earlier-filed action remained pending, or to allow an infinite series of suits. The House Report accompanying the bill containing the ultimately enacted first-to-file language described the bar in categorical terms: "[w]hen an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). The corresponding Senate Report explained that the first-to-file bar reflects the fact that "private [*qui tam*] enforcement under the civil [FCA] is not meant to produce * * * multiple separate suits based on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5290.

The drafters of the 1986 amendments plainly understood how to write a "one-case-at-a-time" rule. The House bill (which included the first-to-file language ultimately enacted) *also* contained a separate provision stating that "'[i]f a claim has been filed under section 6 of the Contract Disputes Act of 1978, an

action may not be brought under th[e] [FCA] * * * based on the same matter that is the subject of the claim * * * *The prohibition of the preceding sentence shall be in effect until such time as the claim is finally resolved or, if an appeal is taken * * *, there has been a final decision on the merits.*'" H.R. Rep. No. 99-660, at 4 (1986) (quoting H.R. 4827, emphasis added). Showing that the drafters understood the practical complexities of this sequencing rule, the bill further provided that the FCA's statute of limitations "shall be stayed during the period in which th[is] prohibition * * * is in effect." *Ibid.*

Had drafters intended the first-to-file bar to function as a one-case-at-a-time rule, they surely would have used the language already developed for this Contract Disputes Act provision—as they did in proposing a sequencing rule for a parallel administrative remedy. See H.R. Rep. No. 99-660, at 13 (using same language to bar FCA administrative remedy during pendency of Contract Disputes Act claims). While these provisions were later deleted as unnecessary "as part of [a] [legislative] compromise," 132 Cong. Rec. 22,336 (1986), Congress's consideration of them *at the same time* as the first-to-file bar underscores the implausibility of Congress creating such a sequencing rule through the use of a single word ("pending") in a clause that textually serves to describe the scope of the bar ("based on the facts underlying the pending action").

3. Rejecting an expiry date for the first-to-file bar best reads the FCA's various limitations on *qui tam* actions "as a symmetrical and coherent regulatory scheme," "fit[ting] * * * all parts into an harmonious

whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks and citations omitted).

Section 3730 addresses in detail the conflicts and inefficiencies that could result when the government and a relator pursue the same fraud. See 31 U.S.C. §3730(b)(2) (allocating responsibility by, *e.g.*, requiring relator to serve the government with a "written disclosure of substantially all material evidence and information the person possesses," and providing 60-day period for the government to investigate); *id.* §3730(c)(2) (court may limit the relator's witnesses, testimony, or examination, or even exclude the relator outright, if it "would interfere with or unduly delay the Government's prosecution of the case"). The FCA tellingly lacks any similar provisions addressing the complications from seriatim litigation of related claims by two relators, suggesting that Congress understood the first-to-file bar would be ongoing from the moment the first action was filed.

This reading of the first-to-file bar in no way undermines "the intended operation of the [FCA's] public-disclosure bar" in 31 U.S.C. §3730(e)(4). *Shea*, 748 F.3d at 348 (Srinivasan, J., concurring in part and dissenting in part). By their plain terms, the first-to-file and public-disclosure bars apply in different procedural postures and to different (if partly overlapping) sets of cases.

Procedurally, the first-to-file bar requires only "compar[ing] the relator's complaint with the allegedly first-filed complaint." *United States ex rel. Poteet* v. *Medtronic, Inc.*, 552 F.3d 503, 516 (6th Cir. 2009); *Shea*, 748 F.3d at 342; see also *In re Natural Gas*

Royalties Qui Tam Litig. (CO2 Appeals), 566 F.3d 956, 964 (10th Cir. 2009) ("quickly and easily determinable, simply requiring a side-by-side comparison of the complaints"). The public disclosure bar, by contrast, often requires resolving fact-intensive issues such as whether the relator's claims were "based on" disclosed information and whether relator was an "original source." *United States ex rel. Jamison* v. *McKesson Corp.*, 649 F.3d 322, 326 (5th Cir. 2011). While both provisions generally "function[] to weed out parasitic claims," the first-to-file bar has the "additional purpose of creating an incentive for relators with valuable information to file—and file quickly." *Natural Gas Royalties*, 566 F.3d at 961; *Wisconsin* v. *Amgen, Inc.*, 516 F.3d 530, 532 (7th Cir. 2008) ("Congress didn't want these bounty hunters piling into the first-filed suit and fighting over the division of the spoils, or, to the same end, bringing separate such suits.").

In some respects, the first-to-file bar sweeps more broadly. The "public disclosure" bar applies only where "allegations or transactions" have previously been "public[ly] disclos[ed]," including in "a criminal, civil, or administrative hearing." 31 U.S.C. §3730(e)(4)(A) (2008). A first-filed case under seal does not trigger the public disclosure bar, but does implicate the first-to-file bar. See J.A. 36, 51. And under the post-2010 FCA, the public disclosure bar i triggered by disclosures in a "Federal criminal, civil or administrative hearing" only if "the Government or its agent is a party," 31 U.S.C. §3730(e)(4)(A)(i) (2011), *e.g.*, has intervened. See *United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 931

(2009). Thus, a non-intervened prior *qui tam* will trigger the first-to-file bar but likely not trigger the public disclosure bar, even after unsealing.

In other circumstances, however, the public disclosure bar can have broader application. While the first-to-file bar applies only after the filing of "an action under th[e] FCA," the (pre-2010) public disclosure bar is triggered by information revealed in "a criminal, civil, or administrative hearing," "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation," and publications by the "news media." §3730(e)(4)(A). The first-to-file bar has no application in those circumstances, and thus no effect on the operation of the public disclosure bar and its original source exemption.

At most, the first-to-file bar may apply to a small *subset* of actions also covered by the public disclosure bar and its original source exemption, see *Shea*, 748 F.3d 350 (Srinivasan, J., concurring in part and dissenting in part), but that slight overlap hardly renders §3730(e)(4) "superfluous," *id.* at 347, or a "dead letter," *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 137 (2007). That Congress allowed an "original source" exemption for the public disclosure bar, but not the first-to-file bar, is unsurprising, given that the first-to-file bar's triggering event (the relator's disclosure of "substantially all material evidence" to the Attorney General, 31 U.S.C. §3730(b)(2)) has far greater significance for the government's knowledge and ability to pursue fraud independently. The government will not receive a similar disclosure in a general "criminal, civil, or adminis-

trative hearing," even when (under the post-2010 FCA) "the Government or its agent is a party," such as in an enforcement action. And because a *qui tam* suit "puts the machinery of the courts in motion, * * * the government cannot ignore the charges for political or administrative reasons, including lack of resources or low priority." *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Admin. Practice and Procedure of the S. Judiciary Comm.*, 99th Cong. 91 (1986). "If a suit makes a claim for compensation without revealing anything new, then it is sensible to block it under §3730(b)(5) even if the relator is an 'original source.'" *United States ex rel. Chovanec* v. *Apria Healthcare Grp. Inc.*, 606 F.3d 361, 364 (7th Cir. 2010).

B. The Panel's Reading Conflicts With The Statutory Purpose

The first-to-file bar's function and purpose must be understood in light of Congress's repeated *qui tam* amendments, "[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010). Congress recognized that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers," by allowing *qui tam* suits to proceed based on "information that was already in the government's possession." *Quinn*, 14 F.3d at 649. To reduce those costs, Congress legislated with the "twin goals of re-

jecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Id.* at 653.

The first-to-file bar represents a critical tool for "strik[ing] the appropriate balance between * * * encourag[ing] whistleblowers to come forward with allegations of fraud and [preventing] copycat actions." *Batiste*, 659 F.3d at 1210; *Graham Cnty.*, 559 U.S. at 294. The provision's plain text, read in light of Congress's "goals" under the FCA, *Quinn*, 14 F.3d at 653, dictates that "once a qui tam suit has been filed under the FCA, the first-to-file bar prohibits any subsequent would-be relator from filing a case based on the same underlying facts." 10A Fed. Proc. Forms § 34:550 (2013).

By prohibiting relators from filing successive *qui tam* suits related to an earlier-filed case, the first-to-file bar "serves two purposes: 'rejecting suits which the government is capable of pursuing itself,' and 'promoting those which the government is not equipped to bring on its own,'" by "encourag[ing] whistleblowers to approach the government and file suit as early as possible." *Shea*, 748 F.3d at 342-343 (quoting *Batiste*, 659 F.3d at 1208). The first-to-file bar "creates a race to the courthouse," *LaCorte*, 149 F.3d at 234, and encourages prompt disclosure by "rewarding the first [relator] to [file suit]," *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005). By rewarding *only* the first to file, the *qui tam* provisions "encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward." H.R.

Rep. No. 99-660, at 23 (1986). Conversely, the bar prevents relators from sharing a *qui tam* recovery when the government has already been "put on notice of the potential fraud claim." *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004).

The bar serves the broader "purpose of the *qui tam* provisions of the False Claims Act," H.R. Rep. No. 99-660, at 23 (1986): i.e., promptly "put[ting] the government on notice of potential fraud being worked against the government, but * * * bar[ring] copycat actions that provide no additional material information." *Batiste*, 659 F.3d at 1210. "[A]n exception-free, first-to-file bar conforms with the dual purposes of the 1986 amendments: to promote incentives for whistle-blowing insiders and prevent opportunistic successive plaintiffs." *Lujan*, 243 F.3d at 1187.

These purposes would be undermined by a temporal limitation. "[R]esolution of a first-filed action does not somehow put the government off notice of its contents." *Shea*, 748 F.3d at 344. "Dismissed or not, [the earlier-filed] action promptly alert[s] the government to the essential facts of a fraudulent scheme—thereby fulfilling a goal behind the first-to-file rule." *Lujan*, 243 F.3d at 1188. "Once the government is put on notice of its potential fraud claim, the purpose behind allowing *qui tam* litigation is satisfied." *Grynberg*, 390 F.3d at 1279; accord *Batiste*, 659 F.3d at 1210 (first-to-file bar applies where initial suit provides "sufficient notice for the government to initiate an investigation"). "On the other hand, reading the bar temporally would allow related *qui tam* suits indefinitely—no matter to what extent the gov-

ernment could have already pursued those claims based on earlier actions. Such duplicative suits would contribute nothing to the government's knowledge of fraud." *Shea*, 748 F.3d at 344.

Rather than encouraging prompt disclosure of material information to the Attorney General, the panel's "one-case-at-a-time" rule encourages plaintiffs "to allow false claims to build up over time" to maximize the value of the alleged fraud. *United States ex rel. Sanders* v. *N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 295 (4th Cir. 2008); accord Pet. App. 37a-38a (Agee, J., dissenting)). And it creates an incentive to disclose information (and litigate claims) piecemeal. See, *e.g.*, *Shea*, 748 F.3d 340-341 (same relator brought identical claims involving different agencies seriatim). As the facts here illustrate, the panel's holding encourages relators to re-plead claims repeatedly, even if other cases put the government on notice of the allegations. "[D]uplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *LaCorte*, 149 F.3d at 234. Allowing serial complaints, the United States has observed, "waste[s] Government resources" by requiring investigation of repetitive claims and "dilut[ing] the Government's recoveries without providing any benefit." U.S. Br. 19, *Chovanec* v. *United States*, 606 F.3d 361 (7th Cir. 2010) ("*Chovanec* U.S. Br."), http://goo.gl/uscYwn. The panel's interpretation thus *undermines* the statutory purpose of helping the government promptly pursue fraud.

Even if the bar applies while the first-filed case is pending, the prospect of subsequent suits will affect incentives in the first suit. Defendants will be less willing to settle an initial case if they anticipate duplicative later suits (or will settle for less money to reserve funds for future suits), increasing litigation costs and decreasing potential bounties for the first-filing relator and the government. Allowing relators to circumvent the first-to-file bar thus harms *all* participants in the *qui tam* process except the parasitic subsequent relators, by "(1) forcing the first relator to enter into agreements to share their recovery with later-filing relators in order to avoid battles like those that occurred in [*LaCorte*]"[20] and thereby "(2) reducing the recovery to relators who were first to file; (3) providing rewards to relators who did not merit a share of the recovery" by providing new information; and "(4) increasing the overall costs of litigation for all involved." Boese §4.03[C][2][b].

There is no assurance that claim preclusion will protect defendants from repetitive litigation. Cf. *Shea*, 748 F.3d at 349 (Srinivasan, J., concurring in part and dissenting in part). Defendants at a minimum will be forced to litigate complex preclusion questions. A second relator not party to the first suit may argue he is not precluded by the first relator's actions. Compare *ibid.* (asserting that "the plaintiff in a *qui tam* action is the United States"), with *Eisenstein*, 556 U.S. at 931 (the United States "is not a

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[20] In *LaCorte*, later plaintiffs interposed objections to the (not-yet-finalized) settlement of an earlier-filed case, seeking a portion of the first relator's bounty. Boese §4.03[C][2][a][i] & nn. 668-672.

'party' to an FCA action * * * unless it has exercised its right to intervene in the case"). If the first-filed case settles, its preclusive effect will vary depending on the terms of the settlement. *E.g.*, *United States ex rel. May* v. *Purdue Pharma L.P.*, 737 F.3d 908, 913 (4th Cir. 2013) (holding that settlement resolving first-filed *qui tam* did not preclude subsequent relators where "[n]either th[ose] [r]elators nor the government were parties to or intended beneficiaries of the Release"). Under KBR's reading of the first-to-file bar, by contrast, "[o]nce an initial *qui tam* complaint puts the government and the defendants on notice of its essential claim, all interested parties can expect to resolve that claim in a single lawsuit." *Grynberg*, 390 F.3d at 1279.

Thus, the weight of reasoned decisions have concluded that "allow[ing] an infinite number of copycat *qui tam* actions * * * cannot be reconciled with §3730(b)(5)'s goal of preventing parasitic [suits]." *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009); see *Shea*, 748 F.3d at 343; *Lujan*, 243 F.3d 1181; *United States ex rel. Pfeifer* v. *Ela Med., Inc.*, No. 07-cv-1460, 2010 WL 1380167, at *15 (D. Colo. Mar. 31, 2010); *United States ex rel. Torres* v. *Kaplan Higher Educ. Corp.*, No. 09-cv-21733, 2011 WL 3704707, at *6 (S.D. Fla. Aug. 23, 2011); *United States ex rel. Friedman* v. *Eckerd Corp.*, 183 F. Supp. 2d 724, 725 (E.D. Pa. 2001).[21]

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[21] That two courts of appeals have suggested otherwise cannot overcome the weight of textual, contextual, and historical authority. The "focus in the *Chovanec* litigation was the relatedness of the actions rather than the meaning of pendency," *Shea*, 748 F.3d at 344; the Seventh Circuit stated without explanation

* * *

We end where we began: this case is now in its eighth year of litigation, after relator has filed what he concedes are four *identical copies* of a single complaint, only to have each case dismissed seriatim after arduous (and expensive) briefing, factual development, and argument. Relator did nothing to advance the government's ability to pursue the allegations, given the numerous prior disclosures such as the first-filed California action. But he now remains free to file a fifth version of the same complaint, subjecting KBR to ever-mounting defense costs and clogging the district court's docket. The threat of an "infinite series of claims," *Chovanec*, 606 F.3d at 362, is fully realized here, and—together with the wall of textual, historical, and judicial authority discussed above—demonstrates why the panel's flimsy rationale and sweeping interpretations cannot possibly reflect how Congress intended either the WSLA or first-to-file bar to operate.

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or textual analysis that "§ 3730(b)(5) applies only while the initial complaint is 'pending,'" *Chovanec*, 606 F.3d at 365. *Natural Gas Royalties*, 566 F.3d at 960, did not involve a dismissed first-filed case at all; the court addressed the issue in dicta, as part of a discussion of whether two suits were "related" and whether a defendant not named in an earlier-filed case can invoke the first-to-file bar.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY APPENDIX

1. Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220 provides:

An Act To amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

"SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

Approved, November 17, 1921.

2. Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51 provides:

An Act Amending section 1044 of the Revised Statutes of the United States as amended by the Act approved November 17, 1921 (chapter 124, Forty-second Statutes at Large, page 220).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1044 of the Revised Statutes of the United States, as amended by the Act approved November 17, 1921 (chapter 124, Forty-second Statutes at Large, page 220), be amended so as to read as follows:

"Sec. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided*, That nothing herein contained shall apply to any offense for which an indictment has been heretofore found or an information instituted, or to any proceedings under any such indictment or information."

Approved, December 27, 1927.

3. Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748 provides:

AN ACT To suspend temporarily the running of statutes of limitations applicable to certain offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

Approved, August 24, 1942.

4. Act of Oct. 10, 1942, Pub. L. No. 77-740, ch. 589, 56 Stat. 781 provides:

AN ACT To suspend until June 30, 1945, the running of the statute of limitations applicable to violations of the antitrust laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statutes, shall be suspended until June 30, 1945, or until such earlier

time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

Approved, October 10, 1942.

5. Contract Settlement Act of 1944, Pub. L. No. 78-395, ch. 358, 58 Stat. 649, 667 provides, in pertinent part:

PRESERVATION OF RECORDS; PROSECUTION OF FRAUD

SEC. 19.

* * *

(b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U.S.C., Supp. II, sec. 590a), is amended to read as follows:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, in-

terim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

* * *

6. Surplus Property Act of 1944, Pub. L. No. 78-457, ch. 479, 58 Stat. 765, 781 provides, in pertinent part:

STATUTE OF LIMITATIONS

SEC. 28. The first section of the Act of August 24, 1942 (56 Stat. 747), as amended, is amended to read as follows:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or

settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

7. Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, 62 Stat. 683, 828 (codified at 18 U.S.C. § 3287 (2006)) provides:

§ 3287. WARTIME SUSPENSION OF LIMITATIONS

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the

war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section.

8. 18 U.S.C. § 3287 (2009 Supp.) (as amended by Wartime Enforcement of Fraud Act, Pub. L. No. 110-417, § 855, 122 Stat. 4545 (2008)), provides:

§ 3287. Wartime Suspension of Limitations

When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5

years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

9. 31 U.S.C. § 3730 (2012) provides, in pertinent part:

Civil actions for false claims

* * *

(b) ACTIONS BY PRIVATE PERSONS.— (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it

receives both the complaint and the material evidence and information.

* * *

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.

* * *

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement

is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

* * *

9. 31 U.S.C. § 3730 (2008) provides, in pertinent part:

(e) CERTAIN ACTIONS BARRED.

* * *

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

* * *

10. 31 U.S.C. § 3730 (2010) (as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901 (2010)) provides, in pertinent part:

(e) CERTAIN ACTIONS BARRED.

* * *

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

* * *

11. 31 U.S.C. § 3731 provides, in pertinent part:

False claims procedure

* * *

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

* * *

12. 31 U.S.C. § 3732 provides, in pertinent part:

False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

* * *

RESPONDENT'S BRIEF

AND
BRIEFS

No. 12-1497

OCT 14 2014
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR, INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT BENJAMIN CARTER

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QUESTIONS PRESENTED

1. Whether this Court should affirm the Fourth Circuit's holding below that the Wartime Suspension of Limitations Act tolls civil actions under the False Claims Act for offenses involving pecuniary war frauds, such as Respondent's action which alleges that Petitioner fraudulently billed the U.S. Army for purifying and testing contaminated water for troops at military bases in Iraq.

2. Whether this Court should accept Petitioner's novel reading of the False Claims Act's first-to-file provision, which would frustrate the statute's purpose to assist the Government to uncover and punish fraud, and would instead permit poorly pled, dismissed cases filed by uninformed relators to permanently immunize Petitioner and future fraud defendants from suits by informed relators with direct evidence of the fraud.

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STATEMENT OF THE CASE

1. Introduction

Respondent Benjamin Carter ("Carter") was stationed at Ar Ramadi and Al Assad military bases in Iraq, near Fallujah, when he personally observed his employer, Petitioner Halliburton,[1] fraudulently billing the United States Government ("Government") for purifying and testing contaminated water from the Euphrates River, when it was doing neither. Instead, Halliburton's fraud exposed American troops, who were showering and brushing their teeth in contaminated water, to serious health risks. A later internal report by Halliburton's Theatre Water Quality Manager in Iraq confirmed that Halliburton's failure to purify water could have resulted in "mass sickness or death." Halliburton then applied for and received a $55 million dollar "award" for, in part, its claimed "excellent" testing and water purification services. The district court never questioned the substantive merits of this case, and, indeed, had ordered it to trial, when the series of unusual procedural events occurred that led this case to this Court.

The issues before this Court are whether (1) the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, tolls Carter's civil False Claims Act ("FCA") action, 31 U.S.C. §§ 3729-3733, for Halliburton's war

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[1] The Petitioners in this case are Kellogg Brown & Root Services, Inc., KBR Inc., Halliburton Company, and Service Employees International (collectively "Halliburton").

fraud offenses, and (2) under the FCA's first-to-file provision, 31 U.S.C. § 3730(b)(5), an FCA case that was dismissed without deciding the merits can bar Carter's case and all future relator actions against Halliburton for its war fraud offenses during the war in Iraq. Halliburton's claim that Congress intended the WSLA to be limited to criminal offenses is without merit. The plain language and legislative history of the WSLA and the FCA demonstrate that Congress intended the WSLA to toll the statute on civil FCA claims involving war fraud offenses. Important policy considerations support this interpretation because Congress intends for the Government to have the alternative of seeking either civil or criminal remedies for war fraud offenses.

Since the Civil War, Congress has recognized problems with uncovering and remedying fraud offenses such as the offense alleged in this case. When it was enacted in 1863, the principal goal of the FCA was to incentivize knowledgeable citizens to come forward and help uncover and punish war profiteers. President Abraham Lincoln, in his support for the original FCA, stated: "'Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the South and bodies of their countrymen are moldering in the dust.'" *U.S. ex rel. Marcus v. Hess*, 127 F.2d 233, 235 n.12 (3d Cir. 1942) (quoting Report of the House Committee on Government Contracts, March 3, 1863). Contrary to Halliburton's position, Congress passed

the FCA to assist the Government in prosecuting fraud, not defendants in avoiding prosecution. Moreover, Congress understood that while the Government may elect not to pursue a fraud, it might be in the interest of this country and its taxpayers for relators to pursue that fraud on behalf of the Government. In the time since its passage, Congress has repeatedly amended the FCA, strengthening and further encouraging relators with knowledge and evidence of fraud to come forward and assist the Government to recover its damages.

In 1941, Congress faced a terrible war that was draining the Government's resources, and again recognized its longstanding policy to combat war fraud. Congress understood that wartime fraud is often difficult to detect, and that witnesses and evidence may be unavailable. Further, those responsible for investigating fraud are often focused on the war effort and war contractor fraud may go undetected until long after the war ends. To address this concern, Congress passed the WSLA, which tolled actions for offenses involving pecuniary war fraud during the war.

While the original WSLA could be read to toll solely criminal offenses, several years later in 1944, Congress made clear that thereafter the WSLA would apply to "any offenses" whether they were pursued through civil or criminal proceedings. While Halliburton seeks to persuade this Court otherwise, using isolated fragments of legislative history, it is clear that Congress passed the 1944 amendments to the WSLA intending that the Government could

pursue either civil or criminal offenses. In 1944, Congress amended the WSLA to apply to the language restricting "any offense," and added additional denominated offenses involving, among other things, war contract offenses, such as the offense at issue in this case, and war property offenses. By doing so, Congress recognized the Government may choose to pursue war offenses through criminal or civil proceedings and there was no reason to distinguish between them.

In 1986, to strengthen the FCA, Congress created the public disclosure and original source provisions, to weed out relators who bring no value, while ensuring that relators with first-hand, valuable information of fraud offenses are authorized and incentivized to pursue those offenses for the Government, even if that fraud has been publicly disclosed. Congress also passed the first-to-file provision to ensure that the Government maintained control over pending cases by precluding third parties from intervening or filing related actions in other courts. This careful balance of barring meritless cases while encouraging cases with merit was essential to Congress's goals. Halliburton now seeks to frustrate that intent by precluding original sources from pursuing fraud on behalf of the government if a meritless case has been filed and dismissed. The FCA was passed to punish fraud not to help those who commit fraud avoid punishment.

Halliburton now asks this Court to disregard Congress's intent and the views of the Solicitor General

in this case, and to significantly impair the ability of the Government to uncover and punish war fraud offenses. To accomplish this, it asks this Court to write into the WSLA words that Congress never wrote, and write out of the FCA words that Congress enacted. Neither interpretation is consistent with the plain meaning of the text of those laws or Congress's express intent, and both interpretations would deprive the Government of essential tools for pursuing war fraud offenses, such as the one in this case, which drain the federal treasury and put our troops at risk.

2. Background

In 2004, pursuant to its contract Logistics Civil Augmentation Program ("LOGCAP") III, Task Order 0059 with the United States Army, Halliburton hired Carter as a Reverse Osmosis Water Purification Unit ("ROWPU") operator. Between January and April of 2005, Carter oversaw the purification of water from the Euphrates River to be used at the Al Assad and Ar Ramadi war bases in the Sunni Triangle near Fallujah in Iraq. Joint Appendix ("JA") 104, 114; Appendix to the Petition for Writ of Certiorari ("Pet. App.") 3a.

While at Al Assad, Carter observed Halliburton employees pretending to purify water because they had no training to operate ROWPU equipment, and fraudulently billing the Government for doing so. JA 116-117. At Ar Ramadi, Carter saw there was no testing or water purification equipment, yet numerous

Halliburton employees were fraudulently billing the Government for purifying and testing the contaminated water. JA 117-125. Instead, Halliburton employees were billing while they were playing softball and relaxing in their "hooches." JA 263-264.

Carter was concerned that troops were showering, washing, and brushing their teeth with highly contaminated water that posed health risks. JA 123-124. He began conducting his own investigation and testing. JA 122-125. During his investigation, he discovered an organism or larvae in what should have been purified water in one of the soldier's latrines, and he reported it to his superiors. JA 471-474. Halliburton did nothing to fix the situation. JA 127. Carter again complained to his superiors, but they told him to keep his mouth shut. JA 478-479. Eventually, Carter resigned. JA 127. Carter later learned that, in or about February 2005, Halliburton applied for and received a $55 million dollar "award" from the Army for, in part, its fraudulent claim that it had done an "excellent" job of purifying water at Al Assad and Ar Ramadi. E.D. Va., Civ. No. 1:10-cv-864 ("*Carter II*"), Mem. in Opp. to Motion to Dismiss, Docket Entry ("D.E.") 36, at 4.

After Carter resigned, Wil Granger, Halliburton's Theatre Water Quality Manager for Iraq and Kuwait, performed his own investigation, which corroborated Carter's allegations. JA 127-129, 509-510. Granger wrote an internal report concluding that the troops and other personnel at Ar Ramadi had for years been exposed to high levels of unpurified contaminated

water posing risks to their health. Wil Granger, *KBR Report Of Findings & Root Cause Water Mission B4 Ar Ramadi*, 3-4 (May 13, 2005), http://www.halliburtonwatch.org/reports/granger_report.pdf. Granger determined that Halliburton was using untrained personnel, had inadequate or non-existent record-keeping, and had not even assembled its purification equipment. *Id.* Granger concluded that the consequences of Halliburton's actions "*could have been very severe resulting in mass sickness or death.*" *Id.* at 4 (emphasis in original).[2]

After Carter returned home from Iraq in 2005, he reported this fraud to Congress and the Department of Justice, and then, in February 2006, he filed this FCA action.

3. Procedural History

Carter filed his complaint on February 1, 2006 as C.D. Cal., Civ. No. 06-cv-0616, which was transferred on November 3, 2008 to E.D. Va., Civ. No. 1:08-cv-1162 ("*Carter I*"). The complaint was unsealed on May 29, 2008 when the Government declined to intervene, authorizing Carter to pursue the action. Pet. App. 4a. Over the next two years, Carter's attorneys obtained extensive evidence corroborating Halliburton's fraud. Their fraud investigation was complicated by the fact that many witnesses were still stationed

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[2] An unknown Halliburton employee gave this report to Congress, but Halliburton never publicly released it.

in war zones in Iraq and Afghanistan. One witness, Carter's supervisor at Ar Ramadi, Walter Meyers, was working in Kandahar in Southern Afghanistan, and had to be flown to Dubai for Carter's counsel to depose him. *See* Deposition of Walter Meyers, January 18, 2010, 8:23-25.

The parties completed discovery and the district court had ordered the case to trial, when, in March 2010, the Government advised the parties and the court that another case, *United States ex rel. Thorpe v. Halliburton Co.*, Civ. No. 05-cv-08924 (C.D. Cal. Dec. 23, 2005), filed a few weeks before *Carter I*, might overlap allegations in Carter's case. JA 220. The district court ordered briefing and, after oral argument, on May 10, 2010, held that *Thorpe* jurisdictionally barred *Carter I* under the first-to-file provision of the FCA. JA 51. In so holding, the court rejected Carter's argument that his case was not based upon the allegations in *Thorpe* because Thorpe had never been to Al Assad or Ar Ramadi and his co-relator had never been to Iraq, and the *Thorpe* complaint contained no allegations about water purification, or any specific conduct at those bases. JA 45-46. The court also rejected Carter's argument that, at least as to the fraud alleged by Carter, *Thorpe* did not satisfy Federal Rule of Civil Procedure 9(b) and was otherwise without merit. JA 50-51. While conceding that case law supported Carter's argument, the court declined to analyze the merits of the *Thorpe* complaint because it was pending before another court. JA 50. The court dismissed *Carter I*

without prejudice, and left open the possibility that Carter could refile his case if *Thorpe* was dismissed. JA 547-548.

On July 13, 2010, Carter appealed the decision on the above and other grounds. Pet. App. 5a. In the interim, as Carter expected, the Government declined *Thorpe*, and the district court dismissed the case for lack of prosecution without reaching the merits. *Id.* On August 4, 2010, Carter then refiled the same complaint (*Carter II*), and attempted to dismiss his appeal. *Id.* While Halliburton delayed dismissal by opposing, the Fourth Circuit eventually dismissed Carter's appeal on February 14, 2011. Pet. App. 5a. Halliburton moved to dismiss *Carter II* on the grounds that it was barred by the appeal in *Carter I*, which was no longer pending. *Carter II* D.E. 31. On May 24, 2011, the court dismissed *Carter II* without prejudice because it found Carter's appeal of his own case was pending when *Carter II* was filed and therefore Carter's own case was first-to-file as to itself. Pet. App. 6a. Had this not occurred, this case would already have been tried, and arguably no statute of limitations issue would even exist.

On June 2, 2011, Carter refiled E.D. Va., Civil Action No. 1:11-cv-602 ("*Carter III*"), and this time the Government advised the parties that two new cases, which were filed in 2007 while both *Carter I* and *Thorpe* were pending, might overlap *Carter III*. JA 550. Halliburton moved to dismiss on this basis and on grounds that the statute of limitations had now run because of the court's prior procedural dismissals

and that Carter was not an original source and barred by the public disclosure bar. JA 563-564. Carter opposed, claiming that (1) the two new cases did not overlap his case, (2) the WSLA tolled the statute of limitations because his case alleged war fraud offenses, (3) the court should relate back or equitably toll the statute of limitations because *Carter I* was filed well within it, and (4) he was an original source. JA 569, 572-573, 581. On November 29, 2011, the district court rejected all of Carter's arguments on the statute of limitations, holding that *United States ex rel. Duprey v. Halliburton Co.*, No. 07-cv-1487 (D. Md. June 5, 2007), barred Carter and the WSLA did not apply to this non-intervened action to pursue a civil war fraud offense. JA 571, 581. The court refused to equitably toll or relate back Carter's identical complaint to the one he filed in February 2006 although all discovery had been completed on the claims and they were set for trial. JA 572 n.11. The court dismissed *Carter III* with prejudice, holding it was barred by the first-to-file provision and the FCA's six-year statute of limitations. JA 583. It did not decide the public disclosure issue. JA 563. Carter appealed. JA 197.

The Fourth Circuit reversed and held the WSLA applies to civil actions for war fraud, such as this case. Pet. App. 16a. The Fourth Circuit concluded the WSLA applies here because Halliburton's fraud was committed while the United States was "at war" in Iraq. Pet. App. 10a-13a. Additionally, the court reviewed the 1944 amendment to the WSLA in which

Congress removed the phrase "now indictable," and concluded Congress intended henceforth for the WSLA to apply to civil offenses involving pecuniary war fraud. Pet. App. 13a-14a. Finally, the court held the WSLA applies to non-intervened cases that are pursued by relators, observing that the "suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case," and that the district court appeared to be "critiquing the purpose of the WSLA itself and not providing a valid basis for excluding relator-initiated claims from the WSLA." Pet. App. 15a-16a. The Fourth Circuit also held that § 3730(b)(5) does not preclude subsequent actions once a related case is no longer pending. Pet. App. 21a-22a. Since both actions which barred Carter's case had been dismissed, the court held he had a right to refile his case, which was still within the applicable statute of limitations. Pet. App. 16a, 22a. The Fourth Circuit remanded the case with instructions to dismiss *Carter III* without prejudice so Carter could refile his case. Pet. App. 22a. Thereafter, the Fourth Circuit denied Halliburton's petition for a rehearing *en banc* and did not stay its mandate. Pet. App. 77a.

On remand, the parties agreed that the district court could address Halliburton's remaining claim that the public disclosure provision barred Carter's complaint. The court held Carter was unquestionably an original source of the allegations in his complaint because he directly and personally observed the fraud at Ar Ramadi and Al Assad. JA 235-242. The court

then dismissed the action without prejudice as directed by the Fourth Circuit. JA 242.

On September 23, 2013, Carter then refiled, E.D. Va., Civ. No. 1:13-cv-1188 (*"Carter IV"*). Upon motion by Halliburton, the court dismissed *Carter IV* without prejudice under the first-to-file provision because of Halliburton's pending petition to this Court, even though *Carter III* had been dismissed. *Carter IV* D.E. 30 at 17-18. This Court granted Certification on July 1, 2014. JA 245.

SUMMARY OF ARGUMENT

1. Congress passed both the WSLA and the FCA to assist the Government in uncovering and punishing fraud by war profiteers who were cheating the Government while it was engaged in warfare.

The WSLA's language that tolls statutes of limitations for pecuniary war frauds, such as the one in this case, by its terms applies to "any offense" whether criminal or civil that involves pecuniary war fraud. The primary meaning of the word "offense," as recognized by this Court, Congress, and relevant reference materials, is "a violation of law," which can be pursued through either civil or criminal proceedings. No other text anywhere in the WSLA supports an interpretation that limits the phrase "any offenses" only to criminal offenses. Halliburton essentially acknowledges this fact, and accordingly focuses its entire argument on statutory and legislative history in

an attempt to persuade this Court to write words into the WSLA that simply are not there.

This argument does not avail Halliburton because an examination of the WSLA's statutory and legislative history supports a finding that Congress intended to apply the WSLA to toll the civil FCA claims in this case. While the WSLA originally contained language which could be read to limit offenses to "now indictable," criminal offenses, Congress deleted that limiting language in 1944 as part of the Contract Settlement Act ("CSA"), Pub. L. No. 78-395, 58 Stat. 649, which also created new civil offenses relating to the negotiation, award, performance and termination of war contracts. Additionally, the same Congress denominated new offenses to be tolled by the WSLA, which included offenses relating to the disposition of surplus property under the Surplus Property Act of 1944 ("SPA"), Pub. L. No. 78-457, 58 Stat. 765. This supports the view that Congress had civil offenses in mind when it amended the WSLA to remove "now indictable." These fundamental changes to the statute and statutory scheme do not constitute ambiguous or collateral amendments. Rather, they demonstrate a clear policy that Congress intended that the WSLA henceforth apply whether offenses were pursued in criminal or civil proceedings. For those reasons, the Fourth Circuit correctly decided that the WSLA applies to Halliburton's "offense" in this case, which involves fraud on the troops in wartime.

Furthermore, as the Fourth Circuit recognized, Congress passed the WSLA to address fraud on the Government and made no distinction whether it was the Government attorney or a relator seeking a remedy for that fraud. The policy considerations underlying the WSLA tolling provisions apply equally to the Government and relators, such as Carter, who are stationed in war zones and are thereby inhibited and delayed from investigating and prosecuting the fraud.

This Court need not and should not consider Halliburton's argument that the WSLA somehow circumvents the 10-year statute of repose in the FCA since all of Carter's complaints were filed within the 10-year statute of limitations.

Similarly, the question before this Court is solely whether the Fourth Circuit was correct in determining that the WSLA applies to toll this civil action for a pecuniary war fraud, and the question of whether the WSLA applies more broadly to frauds unrelated to war is not before this Court. Nevertheless, the language of the WSLA supports an interpretation that tolling only applies to pecuniary offenses, "connected with or related to the prosecution of the war." Indeed, this Court in *United States v. Grainger*, 346 U.S. 235 (1953) has already observed that the language of the statute and the legislative history supports a conclusion that Congress was concerned with pecuniary war frauds.

2. Just as Halliburton seeks to write words into the WSLA that Congress did not include, it seeks to

write the word "pending" out of the first-to-file provision that Congress enacted. As the plain text says, the purpose of the first-to-file provision is to ensure governmental control over FCA cases and to prevent any third parties from interfering with that control by intervening or filing separate parallel FCA actions while the first-filed action is "pending."

The first-to-file rule addresses many concerns. It prevents inconsistent judgments, diversion of government resources and dilution of the relator share, which incentivizes the relator to come forward in the first place. None of these concerns are present once the first-filed action is dismissed and no longer pending.

Halliburton's attempt to read the word "pending" out of the first-to-file rule would allow broadly worded frivolous complaints to bar cases by informed original sources with valuable evidence of fraud against the Government. Congress clearly did not intend such a result because it passed the FCA's original source provision, which incentivizes and authorizes relators with direct knowledge of fraud against the Government to pursue FCA cases even if the fraud is publicly disclosed and known to the Government. Halliburton's hypothetical series of infinite relators' cases will not occur because if cases that are decided on the merits are filed first, they will bar any later cases under both the public disclosure provision and principles of claim preclusion. The only cases that

will not be barred are those with merit brought by original sources as Congress intended.

ARGUMENT

I. The WSLA Applies To Toll The Statute Of Limitations For This Civil Pecuniary War Fraud Offense

A. The Text Of The WSLA Makes No Distinction Between Civil And Criminal Offenses

Halliburton asks this Court to write the words "criminal offense" into the WSLA, and thereby hold it immune from suit for its war fraud offenses against American troops in Iraq on the grounds that the WSLA applies to toll criminal actions for war fraud offenses, but not civil actions for those same offenses. Halliburton is mistaken.

The WSLA, 18 U.S.C. § 3287, provides in pertinent part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection

> with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

The plain language of the WSLA makes clear that it applies to the running of "any statute of limitations" applicable to "any offense" described in subsections (1), (2), or (3), whether pursued by way of criminal or civil proceedings.

When interpreting a statute, courts must "start, as always, with the language of the statute." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668 (2008) (internal quotation and citation omitted); *see also Roberts v. Sea-Land Servs.*, 132 S. Ct. 1350, 1357 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their

place in the overall statutory scheme." (internal quotations and citations omitted)).

Halliburton is incorrect when it contends that the word "offense" can only refer to a crime. It has long been recognized that the word "offense" can refer to offenses such as the FCA offense in this case, which can be subject to either criminal or civil remedies. *See Moore v. Illinois*, 55 U.S. 13, 19-20 (1852) ("An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence."). In other words, the word "offense" refers to a violation of law; the remedy for the violation is a separate matter, and may be criminal or civil or both. That is why the term "criminal offense" is not redundant and why "civil offense" is not a contradiction in terms.

In addition, this Court, appropriate reference texts, and Congress, use the word "offense" to refer to underlying conduct, which can be pursued as either criminal or civil offenses. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.19 (1978) (stating that "Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the [Sherman] Act"). The ordinary, primary meaning of "offense," as defined in legal and non-legal dictionaries, is "a violation of law,"

"a transgression of law," or "a breach of law." *See Oxford English Dictionary* 724 (2d ed. 1991) ("A breach of law, duty, propriety, or etiquette"); *Random House Dictionary* 1344 (2d ed. 1987) ("a transgression of the law"); *American Heritage Dictionary* 1255 (3d ed. 1992) ("[a] transgression of law").[3] Halliburton ignores all of these references and relies on one definition in *Black's Law Dictionary*. Halliburton fails to note another definition of offense that applies to civil offenses that states: "Civil law. An intentional unlawful act that causes injury or loss to another and that gives rise to a claim for damages." *Black's Law Dictionary* 1188 (9th ed. 2009). *Black's Law Dictionary* further explains that offense in the civil sense can refer to torts (such as fraud). *Id.* ("This sense of *offense* is essentially the same as the common-law intentional tort.").[4]

Congress has expressly recognized that the same "offense" may give rise to civil or criminal proceedings or both, including specifically in the context of the

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[3] Halliburton erroneously interprets dictionary definitions by selecting one sense of the term "offense" (*e.g.*, "a crime"), instead of the first-listed, primary sense of the term (*e.g.*, "a transgression of the law"). Brief for Petitioner ("Pet. Br.") 20 (citing *American Heritage Dictionary* 1255 (3d ed. 1992) (defining "offense" as "[a] transgression of law; a crime")). Halliburton cites no support for reading later entries to narrow the primary meaning of the first-listed entry.

[4] *Black's Law Dictionary* recognizes that legal words can be used in many senses and therefore lists the alternative senses as separate definitions rather than combining them in one definition.

FCA. *See* 31 U.S.C. § 3731(e) (collaterally estopping a defendant from denying the elements of an offense in a civil FCA action, brought by the Government or a relator, when the offense involves the same transaction as a criminal proceeding resulting in a judgment rendered in favor of the United States). The same is true in Title 18 of the U.S. Code, including, for example, 18 U.S.C. § 38, which provides a list of covered "offenses" in subsection (a), criminal penalties for those offenses in subsection (b), and civil remedies for those offenses in subsection (c).

Notably, this Court has referred alternatively to both civil offenses[5] and criminal offenses,[6] acknowledging that the word "offense" is not limited to crimes. Moreover, Congress routinely refers to "criminal offenses" to restrict a statute to criminal violations. *See, e.g.*, 18 U.S.C. § 402 (" if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt"); 18 U.S.C. § 983 ("In this section, the term

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[5] *See, e.g.*, *Welsh v. Wis.*, 466 U.S. 740, 754 (1984) (describing "a noncriminal, civil forfeiture offense for which no imprisonment is possible"); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 432 (1914) (Lamar, J., dissenting) (describing the once prohibited charging of interest on a loan as a "civil offense").

[6] *See, e.g.*, *Coleman v. Johnson*, 132 S. Ct. 2060, 2064 (2012) ("federal courts must look to state law for the substantive elements of the criminal offense") (internal citations and quotations omitted).

'civil forfeiture statute' – (1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense. "). There would have been no need for this Court or Congress to add the modifier "criminal" if "offense" could only mean a crime. Halliburton's interpretation of the WSLA that would render the words of other criminal statutes in Title 18 superfluous should be rejected. *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[Petitioners'] view thus runs afoul of the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." (internal citations and quotations omitted)).

Also, the WSLA's surrounding text reveals no language that supports Halliburton's interpretation that "any offense" means "criminal offense" exclusively. Indeed, the law's remaining subsections refer to offenses that are more civil in nature than criminal. Subsection (2) refers to violations pertaining to real and personal property offenses, and subsection (3) refers to offenses involving "negotiation, procurement, award performance, payment for, interim financing, cancellation and termination of contracts, subcontracts or purchase. " 18 U.S.C. § 3287. The WSLA's enumeration of these offenses supports the Fourth Circuit's reading that "any offense" includes offenses underlying both civil and criminal remedies in the FCA and other statutes. Because neither the text nor context of "any offense" provides any basis to narrow that phrase, this Court should

reject Halliburton's narrow interpretation that conflicts with the term's broader, "primary meaning." *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891-92 (2011) (finding no textual basis for adopting a narrow meaning of "report"); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 287-88 (2010) (rejecting holding that the term "administrative" reaches only federal sources, and concluding that "there is no immediately apparent textual basis for excluding the activities of state and local agencies (or their contractors) from its ambit").

If Congress wanted to narrow the WSLA solely to offenses of a criminal nature, it could have easily done so by inserting the word "criminal" before the word "offense" as it has in numerous statutes. Congress was presumably aware that in the decade plus following the WSLA's 1944 amendments nearly every court to consider the WSLA's application to civil offenses held that "any offense" includes offenses pursued under civil laws, including the FCA.[7] By not

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[7] *See, e.g.*, Pet. App. 13a-14a (Fourth Circuit's decision below collecting cases); *see also U.S. v. Strange Bros. Hide Co.*, 123 F. Supp. 177, 184 (N.D. Iowa 1954) (holding that the term "offense" in the WSLA applies to FCA violations involving either civil liability or criminal prosecutions); *U.S. v. Hougham*, 270 F.2d 290, 293 n.3 (9th Cir. 1959) (applying WSLA to civil action under the SPA), *rev'd on other grounds*, 364 U.S. 310 (1960); *U.S. v. Temple*, 147 F. Supp. 118 (N.D. Ill. 1956) (applying WSLA to civil actions under the FCA and 41 U.S.C. § 119 for presentation of a false document for payment); *U.S. v. Salvatore*, 140 F. Supp. 470 (E.D. Pa. 1956) (applying WSLA to a civil action

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responding to this judicial interpretation for over 50 years, Congress is presumed to have consciously decided not to narrow the language of "offense" in the WSLA's subsequent amendments. *See Monessen S. R. Co. v. Morgan*, 486 U.S. 330, 338 (1988) ("we have recognized that Congress's failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that [interpretation]." (internal citations and quotations omitted)).

B. In 1944, Congress Clearly Set Forth Its Intent That The WSLA Apply To Litigation Involving Civil Pecuniary War Fraud Offenses

Since Halliburton recognizes there is no text in the WSLA that supports its position that "offense" means "criminal offense," it spends much of its brief arguing about legislative history. This Court need not and should not refer to statutory history or legislative history because the law is clear on its face, and the law's common sense meaning applies to pecuniary

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under the FCA); *United States v. Kolsky*, 137 F. Supp. 359, 361 (E.D. Pa. 1955) (applying FCA to civil actions under the SPA, and noting "[i]f it had been the intent of Congress to make the [WSLA] applicable to criminal actions only, instead of using the word 'offense' it could have used such words as 'crime,' 'criminal offense,' etc."); *United States v. Covollo*, 136 F. Supp. 107, 109 (E.D. Pa. 1955) (applying WSLA to civil action under the SPA); *United States v. Murphy-Cook & Co.*, 123 F. Supp. 806 (E.D. Pa. 1954) (applying WSLA to civil action under the FCA).

war fraud offenses prosecuted under the FCA's civil provisions. Nevertheless, the relevant statutory and legislative history show that Congress intended to extend the WSLA to such civil offenses when it amended the WSLA in 1944.

Congress enacted the WSLA in 1942 in response to widespread concern about war profiteering during World War II, providing that:

> The running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945.

Act of Aug. 24, 1942, Pub. L. No. 77-706, 56 Stat. 747.

Two years later, on July 1, 1944, Congress enacted the CSA, to address rising concerns with the civil liabilities of contractors following completion of World War II. *See* Sen. James E. Murray, Contract Settlement Act of 1944, 10 Law & Contemporary Probs. 683, 685 (1944) (describing twin purposes of (1) settling the termination claims of war contracts with the greatest possible speed, and (2) protecting the Government against waste and fraud in that process). Consistent with that purpose, Congress simultaneously amended the WSLA, making clear that it applied to civil offenses relating to the war, such as false statements in connection with the termination of war contracts.

The textual changes expanded the WSLA's scope. First, under the 1942 WSLA, the statute was limited to "offenses involving the defrauding or attempts to defraud the United States or any agency thereof . now indictable," and the 1944 Congress deleted the phrase "now indictable." *Compare* 56 Stat. 747-48 *with* 58 Stat. 667. Second, Congress placed the war-frauds clause under a newly established subsection (1), and expanded the WSLA further by creating a new subsection (2) for any offense "committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order. " 58 Stat. 667. As with the amended subsection (1), subsection (2) was not in any way limited to criminal offenses.

It is also evident from the CSA and its legislative history that Congress was particularly concerned with efficiently winding down war contracts and establishing protections against fraud in connection with that process, whether those protections are civil or criminal in nature. *See, e.g.*, 58 Stat. 649 (listing the objectives including "to prevent improper payments and to detect and prosecute fraud"); H.R. Rep. No. 78-1355, at 31-32 (1944); H.R. Rep. No. 78-1590, at 1, 27-28 (1944). In the subsection immediately following the WSLA amendment, the CSA contained civil penalties for making false or fraudulent statements "in connection with the termination, cancelation, settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract

with the United States. " 58 Stat. 667-68. Thus, Congress amended the WSLA to extend its suspension of limitations to war contract offenses at the same time and in the same section of the law in which it provided civil penalties for fraud in connection with CSA war contract violations.

Just three months later, on October 3, 1944, Congress enacted the SPA, addressing the problem of disposing of surplus war materials at the close of World War II. As with the CSA, Congress was concerned with the potential for fraud or waste in connection with this vast governmental process, and it established civil remedies to address those issues. *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956) ("In § 26 of the Surplus Property Act, Congress has provided three alternative remedies. . All three were recognized as civil remedies by Congress before the bill was passed. "). "[T]he Senate Committee on Military Affairs described [these provisions] as providing for 'the civil liability of persons who engage in false, fraudulent, or fictitious activities, or conceal or misrepresent material facts, or act with intent to defraud the United States. '" *Id.* at 152 n.3 (quoting S. Rep. No. 78-1057, at 13-14 (1944)).

Significantly, at the same time it provided these civil remedies in connection with the sale of surplus property, Congress amended the WSLA, again expanding the offenses covered by the provision. Specifically, Congress added a new subsection (3) for "offenses" against the laws of the United States "committed in connection with the care and handling and disposal of

property under the Surplus Property Act of 1944. " 58 Stat. 781. Courts thus recognized that the WSLA would apply to toll any statute of limitations applicable to civil provisions under the SPA. *Kolsky*, 137 F. Supp. 359 (holding that the WSLA tolled the five-year statute of limitations, in 28 U.S.C. § 2462, applicable to civil provisions of the SPA); *but see Koller v. United States*, 359 U.S. 309 (1959) (*per curiam*) (later holding that the five-year statute of limitations, in 28 U.S.C. § 2462, does not apply to SPA § 26(b)(1)).

Notably, in connection with its report on the SPA, the Senate Committee on Military Affairs described how the amendment to the WSLA, passed three months earlier, extended the time to proceed with "litigation" of war-fraud "offenses":

> As was provided in the Contract Settlement Act of 1944, the statute of limitations was suspended until 3 years after the termination of hostilities in the present war. *It is clear that the bulk of the offenses cognizable under this statute will not be apprehended or investigated until the end of the war and will then require considerable time before they advance to the stage of litigation.*

S. Rep. No. 78-1057, at 14 (1944) (emphasis added). The term "litigation" used with the term "offenses" is telling because the SPA undeniably created civil actions for offenses relating to the disposal of war property, and the term "litigation" is commonly used to refer to court proceedings involving civil or criminal

claims. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013); *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012). Thus, if Congress were referring exclusively to criminal prosecutions, the use of "litigation" in the Senate Report would be an unusual word choice. Furthermore, almost all of the offenses in the SPA were civil offenses, so it is unlikely that "bulk of offenses" refers solely to "criminal offenses."

In contrast to this compelling statutory and legislative history, Halliburton's speculation that Congress may have removed the "now indictable" language because it was "redundant," Pet. Br. 30, is unsupported by any legislative history or statement by even a single member of Congress. Halliburton relies on isolated statements in the WSLA's legislative history that say it applies to criminal offenses, but points to no legislative history containing statements by Congress, or anyone else in 1944 or later, that states that the WSLA applies only to criminal offenses, or that it does not apply to civil offenses. This Court has long dismissed similarly flawed logic.[8] *See Wall v. Kholi*,

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[8] Moreover, contrary to Halliburton's contention, Congress's inclusion of the WSLA in a section of the CSA entitled "Prosecution of Fraud" does not evidence Congress's intent that the WSLA apply to civil and criminal proceedings. Indeed, the FCA, in 1940, 1946, and currently, uses "prosecution" to refer to the prosecution of civil FCA actions. *See, e.g.*, 31 U.S.C. § 3730(c)(4) ("the Government's investigation or prosecution of a criminal or civil matter"); 31 U.S.C. § 3730(d)(1) (providing that the relator share depends "upon the extent to which the person substantially contributed to the prosecution of the action"); 31 U.S.C. § 232(C)

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131 S. Ct. 1278, 1287 (2011) (finding that the Court's prior use of the term "collateral review" to refer to a review of the lawfulness of a prior judgment did not preclude the use of the term to describe other proceedings). In any event, isolated statements by members of Congress cannot contravene the statute's plain language and meaning. *See Garcia v. United States*, 469 U.S. 70, 77-78 (1984). Accordingly, the most reasonable interpretation of Congress's 1944 amendments is that Congress intended for the WSLA to apply to civil actions seeking remedies such as this FCA civil action for war fraud offenses.

C. Subsequent Amendments By Other Congresses To Other Sections Of The WSLA Do Not Provide Guidance On The Meaning Of "Offense"

Halliburton's reliance upon legislative history of subsequent amendments to the WSLA that do not speak to the meaning of "offense" is misplaced. *See Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("the views of a legislator concerning a statute already enacted are entitled to no

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(1946) (providing under the notice provision of the FCA that the relator must provide "all evidence and information in his possession material to the effective prosecution of such suit"); *id.* at § 232(E)(2) (stating in a non-intervened case that a "court may award to the person who brought such suit and prosecuted it to final judgment. . . ."); 31 U.S.C. § 234 (1940) ("The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half" the forfeiture and damages recovered).

more weight than the views of a judge concerning a statute not yet passed"); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 204 (1963) (Stewart, J., dissenting) ("In construing these statutes, I think nothing is to be gained from the legislative history of a quite different law enacted by a quite different Congress in 1865, nor from the reports of still another Congress which amended that law in 1912."). For example, Halliburton places significant emphasis on the 1948 Congress's inclusion of the WSLA in Title 18. Halliburton cannot, however, plausibly argue that the 1948 Congress, which did not pass the amendment that removed restrictions on the words "any offense," intended to change the meaning of "offense" merely by adjusting the WSLA's location in the Federal Code. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364-65 n.6 (1984) (explaining that a statute's location and labels do not by themselves transform a civil remedy into a criminal one).

In any event, the 1948 Congress's placement gives meager support for Halliburton's claim. Title 18 contains numerous provisions that clearly apply to civil proceedings, thus eviscerating Halliburton's indispensable premise that Title 18 only applies to criminal laws. *See, e.g.*, 18 U.S.C. § 1964 (Civil RICO); 18 U.S.C. §§ 4243, 4248 (Civil Commitment); 18 U.S.C. § 3626 (Civil actions based on conditions of federal prisons); 18 U.S.C. § 2520 (Civil remedies for illegal wiretapping); 18 U.S.C. § 1595 (Civil remedies for human trafficking).

The legislative history of the FCA's 2008 amendments, which also did not affect the meaning of "any offense," supports the conclusion that the 2008 Congress understood that the WSLA applies to toll civil and criminal actions. *See* S. Rep. No. 110-431, at 6 (2008) (stating that WEFA would allow for "recover[y]" of "money lost in no-bid and cost-plus contracts awarded to companies *that have delivered defective products, overbilled the government, or committed criminal fraud*") (emphasis added); *see also id.* at 5 ("The change is necessary so that the date ending the authorization of military force is clear, *so courts, prosecutors, and litigants* can be sure when the statute of limitations starts to run. This change will avoid any confusion or unnecessary litigation in enforcing fraud cases in the future.") (emphasis added).

D. In The Years Following The 1944 Amendments, The Government Attorneys Responsible For Enforcing The WSLA And The Courts Interpreted The WSLA To Apply To Civil FCA Cases

The Solicitor General in this case agrees that the WSLA tolls Carter's civil FCA action. Moreover, contrary to Halliburton's claim, Congress, the Government attorneys responsible for applying the WSLA, and the courts have all historically treated the WSLA as applying to civil offenses, including specifically the

FCA.[9] Between 1946 and 1959, nearly every court to consider this question agreed with the Government's position that the term "offense" in the WSLA applies to violations of law involving either civil or criminal liability. *See supra* n.7 (collecting cases). Since then, no courts held otherwise until the district court below held that the WSLA does not apply to non-intervened FCA actions brought by relators, and the Fourth Circuit promptly reversed that decision.

Halliburton relies on this Court's holding in *Bridges v. United States*, 346 U.S. 209 (1953), to support its claim that the WSLA does not toll Carter's FCA civil action, but it does not. Halliburton does not acknowledge that at the same time this Court decided *Bridges*, it decided *United States v. Grainger*, 346 U.S. 235 (1953). When read together, this Court's holdings in *Bridges* and *Grainger* are fully consistent with the Fourth Circuit's and Carter's interpretation of the WSLA in this case.

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[9] While the Solicitor General's brief filed in *Koller v. United States*, 359 U.S. 309 (1959) (*per curiam*), can be read to argue that the WSLA does not toll civil offenses, at oral argument the Solicitor General's Office seemingly clarified that the brief was only referring to the specific SPA civil provision at issue in that case. Oral Argument (Part II) at 27:42, *Koller v. United States of America*, 359 U.S. 309 (1959) (No. 362), *available at* http://www.oyez.org/cases/1950-1959/1958/1958_362. Justice Potter Stewart raised a separate issue about whether the WSLA tolled civil FCA cases. The Solicitor General did not respond in the negative. Rather, he confirmed that the Government had taken that position in a number of cases, and district courts had agreed. *Id.*

In *Bridges*, this Court decided that the WSLA applies to pecuniary war fraud offenses. *Bridges*, 346 U.S. at 215, 221. At the same time, this Court decided in *Grainger* that offenses under the WSLA include offenses covered by the criminal false claims provision of the FCA. *Grainger*, 346 U.S. at 237. *Grainger* involved false statements to the Commodity Credit Corp. about wool prices for war contracts. *Id.* at 237-38. Because they were pecuniary offenses, this Court only considered whether the offenses involved defrauding the United States. *Id.* at 241-43. This Court held that the WSLA applied to "offenses" underlying FCA actions:

> which are fairly identifiable as those in which fraud is an essential ingredient, by whatever words they be defined. In the false claims clause of the False Claims Act, Congress met the requirements by identifying the offense as that of making 'any claim upon the United States knowing such claim to be false, fictitious or fraudulent.' The combination of either falsity, fiction or fraud with the claim is enough.

Id. at 244. *Grainger* does not distinguish between civil and criminal proceedings. Thus, *Grainger* is consistent with the Fourth Circuit's holding that the WSLA applies to Carter's civil FCA action for false, fictitious, and fraudulent statements.

E. Interpreting The WSLA To Apply To A Relator's FCA Claims For Civil Fraud Offenses In Wartime Is Particularly Appropriate Given Congress's Intent That The FCA Protect The Government From War Profiteers

1. The FCA is Designed to Provide the Government with a Full Range of Civil and Criminal Provisions for Protecting Against Fraud

Congress enacted the FCA, including its *qui tam* provisions,[10] specifically to address profiteering and fraud by contractors during wartime. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. at 698; *see also Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) ("As the historical context makes clear, and as we have often observed, the FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" (citation omitted)). "[S]ince the significant 1986 amendments to the FCA, the federal government has recovered over $38 billion using the Act." *Oversight of the False Claims Act, Hearing Before the H. Comm. on the Judiciary,*

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[10] *Qui tam* originates in English law, and means in the name of the king. In the context of the FCA, the relator is suing in the name of the United States. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 463 (2007) ("*Qui tam* is short for '*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,' which means 'who pursues this action on our Lord the King's behalf as well as his own.'").

Subcomm. on the Constitution and Civil Justice 113th Cong. 1 (2014) (statement of Chairman Trent Franks). It would not be an overstatement to say that today the FCA is the most effective and powerful tool the Government has to pursue those who commit pecuniary fraud offenses in wartime. *See* Press Release, U.S. Dept. of Justice, Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986 (Jan. 31, 2012), *available at* http://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986.

Congress has amended and revitalized the FCA throughout the statute's history, with the overall purpose of assisting the Government and relators to ferret out and punish fraud and recover monies lost for the Government. *See Graham County*, 130 S. Ct. at 1409. The FCA's text itself makes clear that Congress intends for the Government or relators to pursue civil FCA actions parallel to the Government's pursuit of criminal FCA prosecutions. While the FCA's civil and criminal provisions are now codified in different sections of the United States Code, the underlying offenses are essentially the same and frequently pursued in tandem. Indeed, the FCA's civil provisions specifically provide that final judgments rendered in any criminal FCA proceeding, will have preclusive effect in civil FCA proceedings for the same underlying offense. 31 U.S.C. § 3731(e).

Given that the FCA provides that the liability elements of the offense underlying a parallel civil action are deemed proven, Congress would reasonably

expect the WSLA to toll both civil and criminal actions for FCA offenses. Otherwise, the provision for estoppel would be irrelevant in war fraud cases tolled by the WSLA. *See United States v. Karron*, 750 F. Supp. 2d 480, 491 n.10 (S.D.N.Y. 2011) (collecting cases in which FCA liability is established based on the preclusive effect of a criminal conviction for the same offense). In Title 18, Congress adopted this same procedural approach to estoppel for offenses underlying civil remedies such as 18 U.S.C. § 38(c)(3).

Halliburton's attempt to rebut Congress's plain words in the WSLA, by relying on this Court's holding in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), is misplaced. In *Gabelli*, the SEC sought to create a judicial discovery rule without a period of repose, and this Court, in *dicta*, for illustrative purposes observed that a particular FCA provision, which was not at issue, established a discovery rule with an alternative limit of ten years from the date of offense. *Gabelli*, 133 S. Ct. at 1224 (citing 31 U.S.C. § 3731(b)). This merely shows that Congress often couples a discovery rule with a period of repose to ensure that a discovery rule cannot extend a statute of limitations indefinitely, and this Court was reluctant to sanction a judicial discovery rule without a period of repose. The WSLA, however, is not a judicial rule.

Congress passed the WSLA to address the unique circumstances involved in pursuing wartime fraud offenses. Congress recognized that the distractions of war make it difficult to investigate and pursue fraud offenses during war, and, therefore, Congress tolled

actions while war is ongoing without providing an absolute period of repose. It is Halliburton that is asking this Court to create a judicial rule providing an absolute, ten-year period of repose based on the FCA's discovery rule. Not only is that improper, but this Court need not reach the issue since a ten-year period of repose would not bar Carter's case. Carter filed his action well within Halliburton's proposed ten-year period of repose.

2. The FCA is Designed for Relators to Perform a Vital Function in Uncovering and Prosecuting Fraud

Congress's concern that the protections it provided for wartime fraud offenses would be impacted by the chaos of war applies equally to actions brought by relators or the Government. When a relator is involved in a war zone, as Carter was, he is unable to pursue an FCA fraud action on behalf of the Government until he returns from war. Moreover, the evidence and witnesses involved in that fraud would likely be unavailable to the Government until the hostilities ceased. For example, in this case, a key witness was located in a war zone in Afghanistan, the two bases in Iraq where Halliburton perpetrated the fraud offenses were located in war zones, and the troops who were witnesses to Halliburton's failure to purify water were engaged in combat. Additionally, the Government has an obligation to investigate an FCA action while the case remains under seal, *see* 31 U.S.C. § 3730(b)(2)-(4), and it may be difficult for

the Government to timely investigate its own war contractors (who may be actively assisting the Government in war zones) during war hostilities.

Halliburton's contention that a relator in a non-intervened case is unworthy of the WSLA's protection is unsupported by the law, and contradicted by the FCA's statutory scheme and purpose. The keystone of the FCA is Congress's recognition that the Government needs assistance from private citizens in uncovering and proving war fraud. *Graham County*, 130 S. Ct. at 1409 ("Congress passed the 1986 amendments to the FCA 'to strengthen the Government's hand in fighting false claims,' and 'to encourage more private enforcement suits.'" (internal citations omitted)). Congress understood that the best evidence of fraud comes from those who are close to the fraud itself, and it passed the FCA to incentivize those persons to come forward and assist the Government in prosecuting fraud. In 1986, Congress further empowered and incentivized private citizens such as Carter to assist the Government in prosecuting fraud by authorizing them to prosecute fraud on the Government's behalf even if the Government elects not to intervene. 31 U.S.C. § 3730(c)(3). Congress clearly recognized that there would be cases such as this one where the Government might choose not to intervene, but nevertheless permit and encourage private citizens such as Carter to prosecute the fraud on its behalf. *Id.* Congress also gave the Government the right to move to dismiss non-intervened cases in situations where it believes relators are not acting in the Government's best interest, and in this case

the Government has not done so, *see* 31 U.S.C. § 3730(c)(2)(A). Instead, it fully supports Carter's position before this Court that his case should go forward.

There is no reason in the text of the WSLA or the FCA to conclude that Congress intended for Government actions to toll, while allowing relator actions, which are also designed to protect the Government, to expire. Indeed, the FCA's text shows that, as a procedural matter, Congress intended for relators to stand in the shoes of the United States. *See* 31 U.S.C. § 3730(b) ("The action shall be brought in the name of the Government."); 31 U.S.C. § 3731(e) (estopping defendants from challenging liability in civil FCA actions brought by the United States, 31 U.S.C. § 3730(a), or relators, 31 U.S.C. § 3730(b), based on a final judgment rendered in the United States' favor in a criminal proceeding for the same underlying false claims). Moreover, the FCA anticipates that the Government will have an ongoing role in a relator's FCA case even after a non-intervention decision. 31 U.S.C. § 3730(c)(3) (providing that the Government may monitor the relator's case and intervene at a later date). If it later decides to intervene, and file its own complaint, that complaint relates back to the relator's complaint for statute of limitations purposes. 31 U.S.C. § 3731(c).

F. Under The Interpretation Urged By Carter, The Dire Consequences Halliburton And *Amici* Posit Will Not Occur Because Their Arguments Are Based On False Premises

Halliburton's and *Amici*'s speculated "dire consequences" will not occur, and this Court need not resolve them to decide this case. *See Preiser v. Newkirk*, 422 U.S. 395, 401-02 (1975).

1. The Fourth Circuit's Application of the WSLA to Carter Will Not Open the Floodgates to Revive Stale Claims

Halliburton and *Amici* posit that the floodgates will open if this Court affirms the Fourth Circuit's decision as to Carter. This argument is without merit.

As a preliminary matter, the WSLA is rarely invoked to toll civil actions for war fraud, which is demonstrated by the infrequency with which it has been invoked since the Government began to apply it to civil cases in 1947. Halliburton's argument should, therefore, be rejected as pure speculation. *See Schindler*, 131 S. Ct. at 1895.

In most cases, relators, because of first-to-file concerns, will always file at their earliest opportunity to do so. *See infra* at Part II.D. Moreover, since the statute of limitations for the FCA is six years, their actions will almost always be timely. It is only in the rare case in which a relator is stationed overseas, or witnesses or evidence is otherwise involved in the

war that a relator is likely to use the WSLA's extension, which is precisely why Congress passed it.

2. The WSLA's Application to Fraud Offenses Unrelated to War is Not Before this Court

Halliburton and various *Amici* argue that the WSLA should not be extended to offenses that are unrelated to a war (as a few Courts have recently held). This Court need not, and should not, reach this issue because this case undisputedly concerns an offense involving fraud on troops in wartime in connection with a war contract which is covered under WSLA subsections (1) and (3).

Moreover, the WSLA's text and structure support an interpretation that it is limited to pecuniary offenses "connected with or relating to the prosecution of the war." 18 U.S.C. § 3287. That phrase appears at the end of the statute and could be read to limit the application of "any offense," by applying to all three subsections that precede it.[11] In the context of the

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[11] In other words, the "related to the war" phrase would be read to modify "any offense," rather than subsection (3), thus providing that "the running of any statute of limitations applicable to any offense [identified in the WSLA] which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities. . . ." 18 U.S.C. § 3287.

overall statute, which applies when the United States is "at war," it would be appropriate to construe the WSLA's language as limiting its application to "any offense" that is "connected with or related to the war."

This interpretation is supported by the fact that after the SPA's enactment, the limiting language, "connected with or related to the war," was left at the end of subsection (2). 58 Stat. 781. Congress moved to rectify this situation when it amended the statute in 1948 to reverse the order of subsections (2) and (3), and thereby indicated that the limitation to offenses "connected or related to the war" could refer to all subsections just as the language pertaining to the suspension of limitations applied to all subsections. Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 683, 828.[12]

Furthermore, this Court has already observed in *Bridges* and *Grainger* that WSLA subsection (1) is restricted to "war frauds" of a pecuniary nature. *Bridges*, 346 U.S. at 216 ("The legislative history of this exception indicates a purpose to suspend the general statute of limitations only as to *war frauds*

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[12] Congress also adopted a more expansive definition of war-related property offenses, extending protections from offenses under the SPA to offenses "committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States." 62 Stat. 828. That subsection itself contains no limitation. Without such a limitation, subsection (2) could be interpreted to apply to any offense involving U.S. Government property. That does not appear to be a reasonable interpretation.

of a pecuniary nature or of a nature concerning property." (emphasis added)). Nothing in the WSLA's text or history suggests that Congress intended the WSLA to extend beyond offenses related to the war. Indeed, all of the offenses specifically delimited in the WSLA are or can be offenses directly related to the war. *See* 18 U.S.C. § 3287(1), (2), and (3); *Graham County*, 559 U.S. at 289-90 (other later statutory text may be taken into consideration in determining the meaning of earlier terms).

3. The Triggering Events for Applying the WSLA are not Before this Court

Halliburton also argues that this Court needs to address Congress's choice of triggers for beginning and ending a war under the WSLA. The Court does not need to address these issues.

The Court need not address whether the United States was "at war" in Iraq because the 2008 version of the WSLA makes clear that the Iraq war triggered the WSLA's tolling provision.[13] Moreover, Halliburton's

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[13] It is undisputed that Carter filed *Carter III* after the 2008 amendment to the WSLA, and, therefore, that is the applicable statute in determining the procedural issue. *See Republic of Aus. v. Altmann*, 541 U.S. 677, 693 (2004) (courts "apply changes in procedural rules 'in suits arising before [the rules'] enactment without raising concerns about retroactivity.'") (internal citations and quotations omitted); *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 665 (8th Cir. 1995) ("[T]he ADEA statute of limitations is 'a procedural rather than a substantive requirement' and . . . 'courts apply the procedure in effect when the case is

(Continued on following page)

claims that the WSLA's triggers for when a war begins and ends would lead to indefinite tolling are challenges to the manner in which Congress drafted the statute that go to the WSLA's very substance as enacted by Congress. The validity of this statute is not before this Court, nor should it be. *See Shelby County v. Holder*, 133 S. Ct. 2612, 2645 (2013) (Ginsburg, J., dissenting).

G. Carter Timely Filed His Original Case, And His Refiled Complaints Should Relate Back To His Initial Filing, Or The Statute Should Be Equitably Tolled Under The Circumstances

There is no dispute that, upon returning from Iraq, Carter timely filed his initial FCA complaint,

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before them.'") (internal citations and quotations omitted). Furthermore, Halliburton seemingly conceded in its petition for certification that the question of whether the 2008 or pre-2008 WSLA applies is not before the Court, stating: "[t]he questions presented in this petition – whether the WSLA tolls civil claims brought by private plaintiffs, and whether the panel was correct in determining the statutory suspension period had been triggered – apply to both versions of the statute, and thus this Court similarly need not address the applicability of the 2008 amendment." Petition for Writ of Certiorari ("Cert. Br.") 17-18 n.4. Thus, because Congress authorized the war in Iraq, *see* Authorization for the Use of Military Force against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002), there is no question that the WSLA's suspension period was triggered in this case. *See* 18 U.S.C. § 3287 ("[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces.").

and at all times diligently pursued his judicial remedies in successive complaints. Thus, Carter's case should be allowed to proceed to trial in any event because his refiled complaints should relate back to his initial filing, or alternatively equitable tolling is appropriate. The Fourth Circuit heard, but did not address, these issues because it held that Carter timely filed his complaint under the WSLA. Pet. App. 16a. Accordingly, if this Court finds that the WSLA does not toll Carter's action, this Court should remand this case to the Fourth Circuit to address Carter's equitable arguments, along with his claims otherwise not barred by the FCA's statute of limitations.

This Court has explained the purpose of applying a statute of limitations as "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (internal citation and quotation omitted). Here, Carter filed his claims in early 2006, well within the FCA's statute of limitations, the parties completed all discovery, and the district court ordered Carter's case to trial. There is no concern in these circumstances about lack of notice to defendant, witnesses forgetting events, or lost documents that underlie typical statute of limitations concerns. Thus, there is no reason to apply the FCA's statute of limitations. *See Tiller v. Atlantic C. L. R. Co.*, 323 U.S. 574, 581 (1945) ("There is no reason to apply a statute of limitations when, as here, the

respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in the respondent's yard.").

Alternatively, "[t]his Court has permitted equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," and acknowledged that "tolling might be appropriate in other cases." *Young v. United States*, 535 U.S. 43, 50 (2002) (internal quotations omitted). Carter filed a timely FCA case, and Halliburton received notice of his case. *Burnett v. New York C. R. Co.*, 380 U.S. 424, 434-35 (1965) (tolling a FELA action when the plaintiff served the defendant with process and plaintiff's case was dismissed for improper venue). Additionally, tolling is appropriate here under the unusual procedural circumstances of this case because Carter's delay in filing his present complaint is peculiar to the FCA, and involves such factors as the time his initial case spent under seal, the complications of proceeding with an FCA case against a war contractor while the war in Iraq was ongoing, and the district court's novel applications of the FCA's first-to-file provision.

II. The First-to-File Provision Does Not Bar Carter's Complaint

A. When Congress Said "Pending" It Meant "Pending." The FCA's Plain Language Restricts The First-To-File Provision To Pending Cases

Halliburton asks this Court to hold that it is forever immune from suit for its war fraud offenses because it interprets the term "pending" in the FCA's first-to-file provision, 31 U.S.C. § 3730(b)(5), in a manner that bars Carter's complaint and all other complaints accusing Halliburton of fraudulent billing in connection with services performed in Iraq and other countries. Halliburton's argument is without merit.

Initially, since Halliburton asks this Court to dismiss Carter's complaint below with prejudice, and there are currently no related cases pending, the only issue before this Court is whether a non-pending, dismissed case, which was never decided on the merits, forever bars an original source of information, such as Carter, from pursuing a war contractor such as Halliburton for a related fraud offense. Whether or not such a case bars Carter while it is pending is not before this Court. Halliburton's position that a dismissed case should bar all future actions for fraud related to the allegations in that complaint, whether or not those allegations had merit, is contrary to the first-to-file provision's text, Congress's express intent, and common sense.

The first-to-file provision's plain language makes clear that it applies only when a first-filed FCA action is "pending":

> When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

31 U.S.C. § 3730(b)(5). This provision unmistakably applies to bar an action in two limited circumstances: (1) intervening in a pending FCA action, or (2) bringing an FCA action related to a pending FCA action. There is nothing in the first-to-file provision's plain language that bars actions that are related to a previously filed, but no longer pending action.

Halliburton improperly asks this Court to write the word "pending" out of the first-to-file provision to bar any FCA actions that are in any way related to an earlier-filed, but no longer pending action, regardless of the earlier-filed action's merits. Such an interpretation would make the term "pending" superfluous, and has no support in the first-to-file provision's text. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Contrary to Halliburton's position, the first-to-file provision's text supports the Fourth Circuit's reading that the first-to-file provision applies only when there is a "pending" FCA case (*i.e.*, not dismissed or withdrawn).

The first-to-file provision is written from the standpoint of the first-filed case, and states that a

person may not "intervene" or "bring a related action" based on the facts underlying a "pending action." 31 U.S.C. § 3730(b)(5). Significantly, the prohibitions against intervening in an action or bringing a related action, are both modified by requiring that the first-filed action be "pending."[14] Halliburton contends that the word "pending" is merely shorthand for "first-filed." Pet. Br. 44. Under that interpretation, the first-filed case may be withdrawn or dismissed (*i.e.*, no longer pending) and still be "pending." That definition is nonsensical. Additionally, that definition ignores the fact that a party cannot intervene in a case that is dismissed or withdrawn.

Thus, Halliburton's suggestion that the first-to-file provision applies absent a pending action is inconsistent with the sentence structure of the first-to-file provision. The word "pending" must have the same meaning in the context of "intervention" and "bringing a related action." "By linking the prohibition against intervention with the prohibition against bringing a related action, Congress enacted a provision generally addressed to the effect of a pending action," (*i.e.*, not withdrawn or dismissed). *See United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338, 348

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[14] The word "or" is used as a coordinating conjunction to join phrases of equal grammatical rank to one another. *The Chicago Manual of Style* ¶ 5.194 (16th ed. 2010). It is really two sentences, which prohibit two different actions premised on the same causal event (*i.e.*, a "pending action"), that are combined with a coordinating conjunction.

(D.C. Cir. 2014) (Srinivasan, J., concurring in part and dissenting in part).

If Congress intended to modify the meaning of "pending," it could have separated these two prohibitions, or used a word other than pending to refer to the first-filed action (such as "first-filed," "other," or "previous"), but it elected not to do so. Moreover, if Congress intended to bar all cases filed thereafter it had many ways to make that clear; for example, by inserting the word "ever" before the word "bring" (*i.e.*, "no person can. [ever] bring a related action based on the facts underlying the pending action"). Thus, Halliburton's proposed interpretation of "pending" as "short-hand" to refer to a first-filed case (whether pending or not pending) is untenable.

The Fourth Circuit's interpretation of "pending" is consistent with the word's ordinary, common sense meaning. The word "pending," as used at the time the FCA was amended in 1986, commonly meant "[b]egun, but not yet completed." *Black's Law Dictionary* 1021 (5th ed. 1979). Thus, under an ordinary interpretation of the first-to-file provision, when a *qui tam* action is "filed, but not yet completed," no person other than the Government may intervene or file an action related to that *qui tam* action. Halliburton conveniently omits that nearly every Circuit court that has weighed in on the meaning of "pending" has adopted the Fourth Circuit's definition. *See United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 362-65 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956,

963-64 (10th Cir. 2009). The only exception is the D.C. Circuit, which is apparently split on the definition of pending. *Cf. U.S. ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) ("The command is simple: as long as a first-filed complaint remains pending, no related complaint may be filed."); *Shea*, 748 F.3d at 333-34. The court in *Shea* was itself split. *Shea*, 748 F.3d at 349-50 (Srinivasan, J., dissenting).[15]

B. The Fourth Circuit's Reading Of The First-To-File Provision Is Consistent With The FCA's Statutory Scheme And The Express Intent Of Congress And Halliburton's Reading is Contrary To That Intent

Halliburton's interpretation of the first-to-file provision also conflicts with the FCA's overall statutory scheme. As is clear from the provision's plain language (and its statutory history), it serves the purpose of avoiding a multiplicity of simultaneous relator actions for the same fraud, which is only an issue when there is a "pending" first-filed action. Congress separately addressed the circumstance where the Government is potentially alerted to a particular fraud by a public disclosure such as an earlier-filed,

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[15] Significantly, although Congress has amended the FCA several times since 1986, and is presumably aware that courts have consistently held that the first-to-file provision applies only to pending cases, Congress has never revised this provision to adopt Halliburton's proposed interpretation.

no longer pending action, in the FCA's public disclosure and original source provisions. *See* 31 U.S.C. § 3730(e)(4). These provisions were carefully designed to balance Congress's twin goals of encouraging relators to bring the Government valuable information, while ferreting out parasitic complaints that provide the Government with no new information. *Schindler Elevator Corp.*, 131 S. Ct. at 1894 ("the public disclosure bar was 'an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits.'").

Recognizing that the statute's plain language and the overall statutory scheme do not support its interpretation, Halliburton improperly refers this Court to language in several other statutory provisions that limit their application to pending actions by using different language than the first-to-file provision.[16] *See Amoco Prod. Co. v. Vill. of Gabell*, 480 U.S. 531, 552-53 (1987) ("Going behind the plain language of a statute in search of a possible contrary Congressional intent is a step to be taken cautiously even under

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[16] *See* 28 U.S.C. § 1500 (using the language "has pending" in a provision with a substantially different structure than the FCA's first-to-file provision); 42 U.S.C. § 300aa-11(a)(5)(A)-(B) (same). As should be clear, Congress's choice of the language "has pending" (as opposed to "pending") in provisions substantially different in structure from the FCA's first-to-file provision is not meaningful, particularly since the "has pending" language does not fit in the context of the FCA's first-to-file provision (*i.e.*, the phrase "based on the facts underlying the 'has pending' action" makes no sense).

the best of circumstances." (Quotations omitted)). These examples, which contain very different sentence structures, show merely that depending on the context, there are a number of different ways to limit a procedural bar to the circumstance of a "pending" action, but plainly Congress's use of the language "pending" is a direct and accepted way to do so.

The legislative history of the FCA supports the Fourth Circuit's interpretation. As this Court has recognized, Congress passed the FCA's 1986 amendments to strengthen the FCA and to incentivize and empower relators with knowledge of fraud to file actions and report that fraud to the Government. *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003).

Congress passed the public disclosure bar with the expectation that relators would file cases based on publicly disclosed allegations. In some instances those actions would be barred; however, Congress also recognized that the allegations might be publicly disclosed and even known by the Government and the subject of investigation, but the Government would still benefit from relators who had direct and independent knowledge of the fraud offense. The original source provision authorized such relators to file cases and to pursue them even if the Government declined to intervene, thus showing Congress's intent to allow relators who have valuable knowledge and evidence to bring later-filed actions to pursue defendants who defraud the government.

Under Halliburton's expansive interpretation of the first-to-file provision, if a relator files a frivolous complaint that brings the Government no value, and it is then dismissed or withdrawn without reaching the merits, an original source with direct and personal knowledge of the fraud could never file an action, and war profiteers would be immunized forever by poorly pled cases. Congress would not have passed the original source provision to incentivize such relators and authorize them to pursue non-intervened cases if it intended that result.

This concern is not speculative or hypothetical. In this case, the district court held that *Thorpe*, a poorly pled complaint, alleging widespread unspecified billing fraud throughout the world, filed by relators who had never been to the bases where Carter was stationed, barred a well-pled complaint filed by Carter, an original source with personal knowledge that Halliburton had been falsely billing for purifying and testing contaminated water when it was in fact not doing so. Now, as expected, *Thorpe* has been dismissed without a ruling on the merits, and under the Fourth Circuit's ruling, Carter has the right to pursue his case. If this Court rules for Halliburton, it will never face a jury for any of the fraud offenses related to the *Thorpe* complaint's overbroad allegations. More importantly, under similar reasoning, the *Thorpe* case, which is no longer pending, could bar any lawsuit by any future relator, no matter how knowledgeable and what evidence they have, against Halliburton for fraudulent billing in the countries

where the LOGCAP III contract applies, namely Iraq, Kuwait, Afghanistan, Djibouti, Republic of Georgia, and Uzbekistan. JA 529-530.[17] Contrary to Halliburton's claim, the FCA was passed to help the Government punish fraud, not to help those who defraud the government to avoid punishment. Congress cannot have intended this result.[18]

The first-to-file provision's drafting history also supports the Fourth Circuit's reading of the statute. It shows that Congress was concerned with the Government's ability to intervene in and control litigation when necessary, and prevent other persons from filing multiple and parallel litigations in other courts, and thereby interfering with that "pending" litigation.

Prior to 1986, the FCA had no "provision for the Government to take over the [relator's] action."

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[17] The *Thorpe* action alleged that "defendants defrauded the DOD by systematically inflating, and causing to be inflated, labor costs incurred on the LOGCAP III contract in Iraq, Afghanistan and other countries supported under LOGCAP III." JA 530.

[18] Carter's action was first blocked by the *Thorpe* action that was filed almost a month earlier, on December 23, 2005, it was then blocked by itself, it was then blocked by two actions filed subsequent to *Carter I* (which should themselves have been blocked by *Thorpe* and *Carter*), and it was then again blocked by Halliburton's Supreme Court *certiorari* petition. Along the way, the *Thorpe* action was dismissed, and the subsequent actions were voluntarily dismissed. As a result, Halliburton has avoided accountability for nearly nine years since Carter initiated his first action, and now seeks to immunize itself completely.

Congress added the first-to-file provision in the FCA's 1986 amendments to make clear that no other person could intervene in or divert the case by filing separate cases in different courts. S. Rep. No. 99-345, at 25 (July 28, 1986) (clarifying "that only the Government may intervene in a qui tam action. [and] that private enforcement under the civil FCA is not meant to produce class actions or multiple, separate suits based on identical facts and circumstances.").[19]

At the hearing on the 1986 Amendments, the Hon. Jay B. Stephens, Deputy Associate Attorney General, U.S. Department of Justice, testified:

> one of the concerns we have is the portion of the bill which provides, that even after the Department of Justice has stepped in to litigate a qui tam action on the part of the United States it creates some concern as to how do you manage that kind of litigation. *Second, it creates a concern as to whether or not potentially there could be any collusive action if suits are brought by an associate of*

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[19] The statutory history that Halliburton relies on pertains not to the first-to-file provision but to the FCA generally, or the public disclosure and original source provisions specifically. All of the legislative history that discusses parasitic cases is focused on the government knowledge bar and the public disclosure bar. For instance, in discussing the need for amendments after the Court's ruling in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the legislative discussion explains that the previous government knowledge bar and a reduced relator's share are deterrents to unwarranted parasitic suits. H.R. Rep. No. 99-660, at 22-23 (1986).

> *the defendant who brings a qui tam action, he may remain in the action to try to frustrate the litigation itself.*

False Claims Reform Act, Hearing Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 99th Cong. 20 (1985) (statement of Jay B. Stephens, Deputy Assoc. Att'y Gen. of the United States) (emphasis added). Thus, the provision's legislative history itself focused on possible interference with pending cases, including by the defendant, not barring later cases brought by relators.

C. The First-To-File Provision's Practical Real World Goals Are Accomplished Under The Fourth Circuit's Interpretation

There are good policy reasons for the Fourth Circuit's common sense interpretation that a case must be pending to bar a later-filed case. Restricting filings of parallel actions ensures that courts will not enter inconsistent judgments, Government resources will not be diverted while they are still investigating the first-filed case, the Government will not be obligated to pay more than one relator, and judicial resources will not be wasted. Similar considerations underlie the principles that apply when a federal court stays a case in favor of a first-filed, pending parallel action. *See Emplrs. Ins. v. Fox Entm't Grp., Inc.*, 522 F.3d 271, 275 (2d Cir. 2008) (The first-to-file rule "'embodies considerations of judicial administration and conservation of resources' by avoiding

duplicative litigation and honoring the plaintiff's choice of forum." (citation omitted)); *United States ex rel. St. John LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998) (noting if "dozens of relators could expect to share a recovery for the same conduct" it would decrease their incentive to file a *qui tam*). Finally, Halliburton benefits from the rule by avoiding having to face simultaneous actions on the same or similar conduct.[20] Under the Fourth Circuit's interpretation, the first-to-file provision is narrowly tailored to address these specific considerations that concern only "pending" FCA actions, and Halliburton's broad interpretation, which merely serves to forever immunize defendants from suit, does nothing to further those goals.

D. The Fourth Circuit's Decision Will Not Result In Either An Endless Stream Of Meritless Cases Or A Delay In Filing Cases. Rather It Will Encourage The Early Filing Of Well-Pled Cases By Knowledgeable Relators

Contrary to Halliburton's claims, the Fourth Circuit's interpretation would not open the door to an

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[20] Halliburton's reliance upon the Ninth Circuit's holding in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001), is misplaced. In *Lujan*, the relator's case was filed while an earlier case was pending, and before it was dismissed. *Id.* The court merely held that Lujan's action was barred because the first-filed case was still pending when the relator initiated her action. *Id.*

endless stream of parasitic lawsuits, and it would not encourage relators to sit by and allow their claims to increase, thereby "maximiz[ing] the value of the alleged fraud" before they file. Pet. Br. at 55. These claims demonstrate a misunderstanding of both the FCA law and practice.

Under the Fourth Circuit's interpretation, relators are highly incentivized to file timely, well-pled complaints. Relators are certainly aware that under the first-to-file provision, a first-filed complaint will bar any related actions so long as it is "pending." That is significant, particularly given that FCA cases must be filed under seal, and often remain under seal for many years, 31 U.S.C. § 3730(b)(2). Thus, a relator who waits for damages to accumulate would have no way to know if his claim had already been staked by a pending, first-filed case that was under seal.[21]

Congress specifically addressed Halliburton's concern about endless, parasitic suits in the FCA's public disclosure and original source provisions. Those provisions adopt a legislative balance between encouraging relators to step forward with direct and independent information about fraud on the Government, and

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[21] It is significant that in the Circuits (*e.g.*, Fourth, Seventh and Tenth) where Carter's "pending" interpretation has been applied, there is no evidence that, as a result, relators have waited to file. *See Schindler Elevator*, 131 S. Ct. at 1895 (rejecting relator's hypothetical argument and noting that there is no suggestion that defendants have made FOIA requests to insulate themselves).

discouraging parasitic lawsuits. *See* 31 U.S.C. § 3730(e)(4). Under Halliburton's interpretation of the FCA's first-to-file provision, this legislative balance would be eviscerated. The first-to-file provision would overlap the public disclosure bar with respect to FCA complaints[22] thereby barring "original sources." The application of the "original source" provision would therefore be dependent on whether a relator with a meritless complaint happened to file first. In such a case, all future relator cases would be barred.

Halliburton also fails to recognize that the principles of *collateral estoppel*, claim preclusion and/or *res judicata* would likely apply to any later-filed related case if the first-filed case were decided on the merits, thereby precluding the speculative series of endless relator cases Halliburton posits. *See Chovanec*, 606 F.3d at 362 ("[A] related action based on the facts underlying the pending action must be dismissed rather than stayed. And if the action is related to and based on the facts of an earlier suit, then it often cannot be refiled – for, once the initial suit is resolved and a judgment entered (on the merits or by settlement), the doctrine of claim preclusion may block any later litigation."); *Shea*, 748 F.3d

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[22] Once an FCA case has been filed, the statute requires the Government to investigate it. 31 U.S.C. § 3730(a). Under the public disclosure bar, Government "investigations" constitute public disclosures. 31 U.S.C. § 3730(e)(4)(A). Therefore, both the unsealing of the first complaint and the Government's investigation into the complaint would arguably be public disclosures.

at 349-50 (Srinivasan, J., dissenting). Thus, the only apparent application of Halliburton's novel interpretation of the first-to-file provision is to provide for first-filed complaints, which are dismissed without a decision on the merits, to bar actions by relators with valuable "original source" information and thereby disincentivize those relators from coming forward with evidence of fraud.[23]

In conclusion, Halliburton's appeal here is an attempt to write words into the WSLA and out of the first-to-file provision to avoid a trial on the merits on, and to obtain permanent immunity for, its war fraud offenses. This war fraud involves putting the health of the men and women in the United States armed forces at risk while fraudulently billing the United States Government for years for purifying and testing contaminated water for our troops in Iraq, which never happened. Halliburton's arguments are contradicted by the plain language of the statutes involved, the intent of Congress, and this Court's decisions. Congress passed the FCA to punish these offenses and the WSLA to toll the time to bring them while our country is distracted by war.

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[23] Also, as a practical matter, while the first-to-file provision does not apply to the government it is doubtful the government would pursue its own action if it did not intervene in the first-filed action. Relators bring valuable knowledge and evidence to the government, and, absent such evidence and corroborating witnesses, it is unlikely the government will prosecute.

CONCLUSION

The Judgment of the Fourth Circuit below should be affirmed.

Respectfully submitted,

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18 U.S.C. § 3287 (2009) provides:

Wartime suspension of limitations

When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

Definitions of terms in section 103 of Title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the

use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

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31 U.S.C. § 3730 (2012) provides in relevant part:

Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it

receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

* * *

REPLY BRIEF

Supreme Court, U.S.
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No. 12-1497

In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL, PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

The responsive briefs lay bare this case's central feature: The Fourth Circuit panel read two laws in a way that effectively repeals the statute of limitations for claims of civil fraud against the government in the post-9/11 world, and gives private relators leave to refile duplicative claims indefinitely. That decision rests on the thinnest textual support, in each instance interpreting a single word in isolation—"offense" for the Wartime Suspension of Limitations Act ("WSLA"); and "pending" for the False Claims Act ("FCA"). The briefs defending that decision are remarkable in two respects.

First, they repeatedly fail to address fundamental arguments about statutory context, structure, and history, beginning with the most basic issue: failure even to *mention* this Court's long-established rule of "narrowly construe[ing]" the WSLA in favor of repose. *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953). Second, the government has reversed its position on *both* questions, seeking expanded liability for a vast range of industries against the backdrop of the billions in FCA settlements that have helped create a self-proclaimed "Profit Center for the U.S. Treasury." U.S. Dep't of Justice Civil Division, FY2013 Budget (Feb. 2012), http://goo.gl/rr6I3N.

But applying ordinary principles of statutory construction would avoid what even respondent evidently now concedes are the untenable practical effects of indefinitely tolling claims having nothing to do with wartime constraints on prosecutorial resources. See Resp.Br.41-43. If Congress truly intends such a result, it would be simple to achieve legislatively. But

this Court should not conclude Congress "alter[ed] the fundamental details" of two critical statutes, *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), on such a scanty textual basis.

ARGUMENT

I. THE WSLA DOES NOT APPLY TO THIS CIVIL CASE

A. Text, Structure, History, And Purpose Limit The WSLA To Crimes

1. *Text.* Carter and the government focus on one word ("offense") in isolation. Because it is sometimes used in other contexts to describe civil violations, they reason that "offense" must carry its broadest possible reading here. U.S.Br.10-12; Resp.Br.18-21. That position is dubious by its own terms, as key definitions show that the broad-sounding phrases Carter carefully excerpts (e.g., "[a] violation of the law"), are "synonymous" with a "crime" and "criminal offense." *Black's Law Dictionary* 1186 (9th ed. 2009) ("1. A violation of the law; a crime, often a minor one. See CRIME. — Also termed *criminal offense*."). *Black's* lists 50-odd examples of "offense" that mean "crime"; while Carter emphasizes one use of the term under "[c]ivil law" systems, see Resp.Br.19, *Black's* plainly uses that term to distinguish *common*-law systems, *not* criminal law. *Black's* 1186-1188 (citing La. Civ. Code).

The government and Carter agree "'offense' * * * sometimes does not" "encompass[] civil violations." U.S.Br.12 n.1; accord Resp.Br.18 ("may be criminal or civil"). That concession is fatal, because the WSLA

must be "narrowly construed" as "an exception to a longstanding congressional 'policy of repose' that is fundamental to our society," *Bridges*, 346 U.S. at 215-216, and "appl[ied] only to cases * * * clearly within its purpose." *United States* v. *McElvain*, 272 U.S. 633, 639 (1926). Neither responsive brief even *acknowledges* this bedrock rule of construction, instead inverting it to give "offense" its broadest scope. Resp.Br.21-22 ("narrow interpretation * * * conflicts with the term's broader * * * meaning" (internal quotation mark omitted)); U.S.Br.12 ("broadly applies"). "Even assuming an equal likelihood" Congress intended the "broader reading rather than the narrower [one]," a "rule requiring a narrow construction * * * tips the balance in favor of the narrow reading." *Dep't of Energy* v. *Ohio*, 503 U.S. 607, 626 n.16 (1992).[1]

2. *Context and structure.* Neither Carter nor the government has any response to arguments that (a) reading "offense" in title 18 to include civil violations would render the WSLA's neighboring provisions nonsensical, Pet.Br.21; and (b) Congress has repeatedly amended the WSLA to ensure symmetry with the *criminal*, not civil, statute of limitations, *id.* at 22.

a. That Congress has used "offense" to describe civil violations elsewhere in the Code, or that this Court has used it to describe state common-law rem-

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[1] Carter's assertion (Resp.Br.33) that *United States* v. *Grainger*, 346 U.S. 235 (1953), "does not distinguish between civil and criminal proceedings" is curious. *Grainger* addressed whether *criminal* false claims satisfy the prerequisites for WSLA tolling and *never* mentioned the word "civil."

edies (U.S.Br.10-11), does not change the fact that *every instance of "offense" in title 18 denotes a crime.* Pet.Br.20-21.[2] The suggestion that "'Title 18 use[s] the word 'offense' to refer to conduct with both civil and criminal penalties," U.S.Br.13 & n.3; accord Resp.Br.18, overlooks the textual distinction between a criminal "offense" and associated "civil penalty." For instance, 18 U.S.C. §38 specifies "[o]ffenses * * * punish[able] as provided in subsection (b)," which enumerates five levels of criminal "fine[s]" or "imprisonment," while subsection (c) separately authorizes "[c]ivil remedies" against "a person * * * *convicted of* an offense under this section." *Id.* §38(a)-(c) (emphasis added).

Similarly, 18 U.S.C. §248(b) (U.S.Br.13 n.3) uses the word "offense" only to specify criminal "fine[s]" and "imprison[ment]." The statute separately authorizes "[c]ivil remedies"—not for a civil "offense," but for "conduct prohibited" by statute. Accord 18 U.S.C. §670 (imposing "[c]riminal penalties" for "offense[s]" and "[c]ivil penalties" for "violation[s]"). The sole occurrence of "offense" in defining "[c]ivil [RICO] remedies," 18 U.S.C. §1964 (U.S.Br.13 n.3; Resp.Br.30), is to estop a convicted defendant from denying essential allegations from a "criminal offense." "[O]ffense" in 18 U.S.C. §4243(a) (Resp.Br.30) addresses the consequences of being "found not guilty

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[2] The government concedes that the sole exception it has ever identified—the 93-year-old conspiracy statute in *United States* v. *Hutto*, 256 U.S. 524 (1921) —was long ago amended to match title 18's current use of "offense" as a crime. U.S.Br.11-12 n.1.; Pet.Br.21-22 n.7.

only by reason of insanity at the time of the offense"—plainly a criminal meaning.[3]

b. The FCA's use of "offense" (Resp.Br.19-20) undermines the panel's reading. A defendant convicted "in any criminal proceeding charging fraud or false statements" is estopped from "denying the essential elements of the offense"—i.e., the crime—"in any action which involves the same transaction * * * brought under" the civil FCA. 31 U.S.C. §3731(e). Carter inverts the syntax in paraphrasing §3731(e), wrongly suggesting that the statute uses "offense" for the civil proceeding. Resp.Br.20.

c. That the WSLA tolls limitations not only for "offenses involving fraud," 18 U.S.C. §3287(1), but also "offense[s] * * * committed" involving government property and contracts, *id.* §3287(2)-(3), proves nothing. Cf. U.S.Br.18; Resp.Br.21,27. Both categories apply only to "offense[s]," and the description of covered conduct sheds no light on whether "offense" is criminal or civil. That Congress specified "offenses * * * committed" strengthens the criminal connotation. See 18 U.S.C. §371 (criminal conspiracy "to commit any offense against the United States"); *Deal*

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[3] 18 U.S.C. §216 (U.S.Br.13 n.3) distinguishes between criminal "punishment[s] for [specified] offense[s]," and a "civil action" arising from "conduct constituting an offense." 18 U.S.C. §1033(a) defines insurance "[c]rimes" and specifies "punishment for an offense," without civil penalties. 18 U.S.C. §2292(c) uses "offense" for criminal conduct subject to fine or imprisonment. Accord *id.* §2339B(d) (referring to an "offense under subsection (a)," carrying criminal penalties of "fine[s]" and "imprison[ment]," distinct from "[c]ivil penalty" under subsection (b)); *id.* §2339C (similar). Other cited provisions never use the word "offense." See 18 U.S.C. §§1595, 2520, 3626, 4248 (Resp.Br.30).

v. *United States*, 508 U.S. 129, 135 (1993) ("It cannot legally be known that an offense has been committed until there has been a conviction."). The WSLA refers not to the civil enforcement provisions in the 1944 amendments, but rather "offenses * * * committed *in connection with*" contracting or disposal of property, 58 Stat. at 781. Thus, there is no necessary inference that the WSLA tolls the limitations for the civil violations defined in those statutes. Cf. Resp.Br.25-26.

Suggesting the Contract Settlement Act ("CSA") "was largely civil in nature" (U.S.Br.17) ignores the WSLA's placement in a section of the 1944 Act entitled "PROSECUTION OF FRAUD," which included new criminal prohibitions on destroying or failing to maintain war records, and against former government employees pursuing claims against the government. 58 Stat. 667-668. Critically, the new criminal records offense, unlike the civil remedies, extended the required recordkeeping period until after "the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress"—language identical to the WSLA's. *Id.* at 667.

Congress's general intent to use "all practicable methods * * * to detect and prosecute fraud," 58 Stat. 649 (U.S.Br.17), does not mean Congress pursued that purpose at all costs; the statutory text is consistent with a criminal-only reading.[4] Carter and the

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[4] The CSA's civil enforcement mechanisms "prevent improper payments," 58 Stat. 649, and deter fraud with or without tolling. See §§8(d), 13(a), 18(a), 58 Stat. 656, 660, 666 (penalty for overstatement; audits; recordkeeping).

government ignore that Congress contemporaneously established tolling for "violations of the antitrust laws * * * now indictable *or subject to civil proceedings*," 56 Stat. 781 (emphasis added). And the government concedes the WSLA's military-justice analogue, 10 U.S.C. §843(f), applies only to criminal violations (U.S.Br.12 n.2). That Congress separately enacted §843(f) indicates it believed the WSLA's application was *limited to title 18*.[5]

3. *History*. Carter and the government all but ignore the statute's 1921 origins. See Resp.Br.24 ("Congress enacted the WSLA in 1942"); U.S.Br.16 (same). For good reason: That law unquestionably authorized only criminal tolling, and this Court's construction of it (again ignored) undercuts their theory that subsequent amendments radically expanded the statute's scope. See Pet.Br.23-29; NDIA Br.6-13.

a. The lynchpin of the responsive briefs' historical argument is Congress's unremarked 1944 deletion of "now indictable under any existing statutes." But the suggestion that "now indictable" "had limited the WSLA's application to criminal fraud offenses" (U.S.Br.17) is foreclosed by *McElvain*, 272 U.S. at 637, which read the materially indistinguishable language of the 1921 statute as limiting tolling "to offenses * * * not already barred." The panel's reading deprives the phrase of independent meaning: the

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[5] See *Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 1044 (1949) (statement of Felix Larkin, Ass't Gen. Counsel, Dep't of Defense) ("it is not clear that [the WSLA] applies to court-martial cases by virtue of being in title 18"); H.R. Rep. No. 81-491, at 22 (1949); S. Rep. No. 81-486, at 19 (1949).

1921 statute explicitly applied only to "limitations in criminal cases." 42 Stat. 220.

KBR identified several other readings of "now indictable under any existing statutes" (and its deletion) far more "sound" (U.S.Br.19) than the panel's transformative interpretation. Congress may have included the phrase to make especially clear that tolling applied to conduct that had already taken place, given cases requiring a "clear intendment" to do so. H.R. Rep. No. 67-365, at 2 (1921). Focusing on only a part of the deleted phrase (see U.S.Br.17 ("[t]he 'now indictable' language"); Resp.Br.25 (similar)), distorts its meaning. Conduct indictable "under any existing statutes" refers to offenses that had already occurred, and excludes violations of later-enacted statutes. Practice had clarified the provision's meaning by 1944. Pet.Br.31 n.12. That Congress made its intent particularly clear even at the risk of repetition (cf. U.S.Br.19) is unsurprising, as the Solicitor General's admonitions weighed heavily in drafters' consideration. Pet.Br.29-31 & n.12.[6]

b. The government offers a revisionist history of the CSA, speculating that Congress would have wanted to toll civil fraud limitations. U.S.Br.17-18. But the 1944 statute referred not to an "offense" simpliciter, but an "offense against the laws of the United States," 58 Stat. 667, a phrase consistently used to describe crimes—and which this Court does *not* apply to civil actions. See 18 U.S.C. §3231 (granting dis-

[6] Congress alternatively may have understood that deleting "now indictable" expanded tolling to conduct postdating the CSA. See NDIA Br.6; NELF Br.9-24.

trict courts criminal jurisdiction "of all offenses against the laws of the United States"); *Tafflin* v. *Leavitt*, 493 U.S. 455, 464 (1990) ("civil RICO claims are not 'offenses against the laws of the United States,' §3231, and do not result in the imposition of criminal sanctions").

Because the statute was *always* limited to crimes, there is no need to identify post-1944 authority "limit[ing] the WSLA's reach." U.S.Br.20. Carter and the government again conspicuously disregard key evidence. Congress recodified the WSLA in 1948 along with a chapter of "general provisions," the very first of which—18 U.S.C. §1—defined "offense" to mean *either* "a felony" or "misdemeanor." 62 Stat. 684; cf. U.S.Br.12 n.1 (calling less-serious offense "misdemeanor" suggests "offense" "means 'crime'"). Placing the WSLA in title 18, with its own definition and consistent usage of "offense," implicates well-established interpretative principles. "[A]dding new definitions of terms previously undefined, is a common way of amending statutes." *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 381 (2004). The 2008 amendments left the WSLA in title 18, with its *still*-uniform usage of "offense," and within a chapter treating "offenses" as either "capital" or "non-capital." 18 U.S.C. §§3281-3282.[7]

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[7] The reference to "investigators and auditors" (U.S.Br.22) follows concerns about barring "criminal actions in investigations of contracting fraud," see S. Rep. No. 110-431, at 4 (2008), and is consistent with a criminal focus. See *Donaldson* v. *United States*, 400 U.S. 517, 534 (1971) ("indict[ment] and [p]rosecut[ion] * * * necessarily depend on the result of th[e] au-

c. The responsive briefs also ignore the contemporaneous understanding of the agency administering the CSA that the statute tolled limitations for "criminal prosecutions." See Pet.Br.26. And they conflict with the government's position in *Koller* v. *United States*, that Congress "provided no suspension of limitations with respect to civil actions [under the 1944 amendments]"—because "[no] statute of limitations was [then] applicable to a[] [civil] action under that Section." U.S.Br.28, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362).[8] The government's suggestion that its now-abandoned position reflected ignorance of arguments it now finds persuasive is contradicted by the record.[9]

Congress in 2008 did not "acquiesce" in the position of a handful of half-century-old lower-court decisions. Resp.Br.23. This Court is "loath to replace the plain text and original understanding of a statute" by

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dit"). Civil liability is not generally seen as "bring[ing]" a defendant "to justice." S. Rep. No. 110-431, at 4.

[8] The reference to "offenses cognizable under this *statute*," S. Rep. No. 78-1057, at 14 (1944), refers not to civil remedies in the Surplus Property Act ("SPA") (cf. U.S.Br.22; Resp.Br.27-28), but *criminal* offenses tolled under that Act's "Statute of Limitations," 56 Stat. 781. The Report uniformly refers to the SPA as the "act," distinct from the "statute of limitations." S. Rep. No. 78-1057, at 4, 6, 10, 12, 13, 14, 15.

[9] The government declined to "withdraw [its] statement" (U.S.Br.20 n.6) limiting the WSLA to criminal prosecutions even after petitioner raised the sequence of enactments resulting in the "delet[ion]" of "'now indictable,'" the predominantly civil enacting legislation, and despite explicitly acknowledging cases applying the WSLA to civil claims. Tr. of Oral Arg., pts. 1 & 2, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362), at http://goo.gl/dpRtAz.

such an inference, absent "overwhelming evidence" that Congress considered the "precise issue." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001). That standard is not satisfied by decades-old trial court dicta conflicting with the Executive Branch's contemporaneous interpretation, see p. 10, *supra*, where the WSLA lay moribund for sixty years, and there is no evidence Congress considered and endorsed the "precise issue."

4. *Purpose.* Carter and the government cannot link civil tolling (for government fraud litigators, much less private ones) with the WSLA's purpose of providing investigators and prosecutors additional time when the "*law-enforcement branch* of the Government is * * * engaged in its many [wartime] duties," such as "the enforcement of the espionage, sabotage, and other laws." *Bridges*, 346 U.S. at 219 n.18 (emphasis added). Private relators encounter *no* such resource constraints. Only by abstracting the statutory purpose beyond recognition—as a panacea for *any* "misconduct that threaten[s] the public fisc," U.S.Br.23—can the government justify its complete inversion of "narro[w] construc[tion]," *Bridges*, 346 U.S. at 215-216.

The government meekly asserts that relators "may" have difficulty obtaining "necessary evidence," U.S.Br.15, citing no supporting authority. Most FCA claims involve domestic conduct unrelated to war, see Pet.Br.42 n.17; nearly *half* involve *health care*. Chamber Br.15. The record number of suits (*id.* at 13) suggests that wartime exigencies are not impairing the government and relators. Carter does not suggest that wartime conditions made *him* "unable to

pursue [his] FCA fraud action," Resp.Br.37, first filed *within a year* of the alleged false claims, Pet.App.3a-4a. He since filed verbatim copies of one complaint. The WSLA's only role here would be to relieve Carter from the first-to-file bar.[10]

B. The Panel Eviscerated The FCA's Statutes Of Limitations And Repose

Congress clearly expected the WSLA to toll the general criminal statute of limitations, its neighbor in a chapter on "[l]imitations." See 18 U.S.C. §3282(a); U.S.Br.13. But the WSLA cannot coexist with the FCA's detailed and specific limitations periods, which *already provide* for tolling where the government has difficulty investigating through a "discovery rule," while guarding against "fraud actions *ad infinitum*" (H.R. Rep. No. 99-660, at 25 (1986)) with a ten-year statute of repose. See 31 U.S.C. §3731(b).

Carter and the government do not dispute that this Court recognized 31 U.S.C. §3731(b) as an "absolute" ten-year statute of repose. See Pet.Br.35. Instead, they ask this Court to disregard that portion of §3731(b) because Carter's complaints were filed within ten years of the relevant conduct. Resp.Br.36-37; U.S.Br.14-15. But this Court interprets statutes to ensure that provisions work together as "a symmetrical and coherent regulatory scheme," fitting "*all* parts into an harmonious whole"—not just those that

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[10] The government can investigate already-filed *qui tam* cases without wartime tolling. Cf. Resp.Br.37-38. The statute of limitations is no bar once a case has been timely filed, and the FCA expressly allows the government to obtain extensions when it needs more time to investigate. 31 U.S.C. §3730(b)(3).

apply in a given case. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (emphasis added). This Court routinely considers hypothetical situations to ensure an interpretation makes sense under other circumstances. Exceeding the statute of repose is not hypothetical: The panel held that the FCA's limitations period has been tolled well over a decade. Pet.App.10a-13a.

C. Carter Cannot Minimize The Dire Consequences Of The Panel's Rule

The responsive briefs' efforts to downplay the severe practical effects of the panel's ruling have no basis in reality. The suggestion that "the WSLA is rarely invoked" (Resp.Br.40) is disproven by the flurry of invocations during the pendency of this case. See Pet.Reply2 & n.3; Pet'rs Supp.Br; *U.S. ex rel. Silver* v. *Omnicare, Inc.*, No. 11-cv-1326, 2014 WL 4827410, at *8 (D.N.J. Sept. 29, 2014). The government's use alone has more than doubled since 2008. Pet.22. Carter is likewise wrong that the WSLA will be invoked "only" when a relator "is stationed overseas, or witnesses or evidence [are] otherwise involved in the war." Resp.Br.40-41. Self-interested relators are invoking the WSLA in cases having nothing to do with war. Pet.Br.42 n.17.

Belatedly recognizing that the panel decision's "dire effects" (Pet.App.46a (Agee, J., concurring in part and dissenting in part)) render its statutory interpretation implausible, Carter suggests for the first time that the WSLA applies only to war-related frauds. Resp.Br.41-43. No court has accepted that theory; several rejected it outright. *E.g.*, *United*

States v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 633 (S.D.N.Y. 2013).

Whether or not the 2008 WSLA applies (which the parties dispute, contra Resp.Br.43 n.13), the panel's expansive reading of "at war" matters. It is far broader than, and thus renders meaningless, the express post-2008 provision for congressional authorization of use of military force, dramatically expanding the scope of tolling. See S. Rep. No. 110-431, at 4 ("Th[e] [2008] amendment is not intended to apply to * * * military actions not specifically authorized by Congress.").[11]

II. CARTER CANNOT DEFEND THE PANEL'S ONE-CASE-AT-A-TIME RULE

A. The First-To-File Bar's Text And Structure Impose No Temporal Limitation

1. Though Carter and his *amici* feign fidelity to statutory language, they show little interest in the first-to-file bar's full text, which Carter grudgingly quotes *once* near the end of his brief. See Resp.Br.48. Instead, their "textual" arguments mainly consist of repeating one word—"pending"—divorced from its context.[12] See Resp.Br.50-51; U.S.Br.26; cf. *Abramski*

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[11] Carter did not press his relation-back theory below, and forfeited his equitable tolling claim by belatedly raising it in district court. Resp.Br.44-46. Neither Carter's brief in opposition nor the panel mentioned those issues, and they are not before this Court.

[12] Carter selectively (mis)quotes § 3730(b)(5), suggesting that it refers to "*a* 'pending action,'" Resp.Br.49 & n.14 (emphasis added), not "*the* pending action," § 3730(b)(5) (emphasis added).

v. *United States*, 134 S. Ct. 2259, 2267 (2014) (reading "words not in a vacuum, but with reference to the statutory context, structure, history, and purpose"). Carter and his *amici* strain to make "pending" the provision's centerpiece. But in truth it is a subsidiary qualifier, serving only to describe *what facts* the bar on "related action[s]" covers: namely, "the facts underlying the pending action." 31 U.S.C. §3730(b)(5).[13]

KBR's interpretation thus does not render the word "pending" "superfluous." Resp.Br.48; U.S.Br.27. The "referential" use of "pending" to identify which action bars the other," *U.S. ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014), accords with the legislative history of *the first-to-file bar*, which Carter and his *amici* shun in favor of statements about the FCA or the 1986 amendments generally.[14] That history omits this supposedly central

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The definite article strengthens the inference that the phrase is referential.

[13] *Carey* v. *Saffold*, 536 U.S. 214 (2002) (U.S.Br.26), involved the exclusion from the one-year federal habeas limitations period of "[t]he time during which a [state petition] * * * is pending." 28 U.S.C. §2244(d)(2). *Saffold* demonstrates the importance of context: Under *Saffold*, a state postconviction action is deemed "pending" even when "nothing had been under consideration or awaiting the result of an appeal." 536 U.S. at 228 (Kennedy, J., dissenting).

[14] Carter distorts (Resp.Br.56-57) Administration testimony on an early version of the 1986 amendments. *Hearing on S. 1562 Before the Subcomm. on Admin. Practice & Procedure of the S. Judiciary Comm.*, 99th Cong. (1985). The witness explicitly *opposed* the result Carter now seeks: i.e., "permit[ting] a relator to bring an action based on evidence available to the Government * * * where the Justice Department does not choose to enter a suit." See *id.* at 20-21 (statement of Jay Stephens).

limitation, explaining that "[w]hen an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986).

Neither Carter nor the government explain why Congress would have spoken so obliquely if its goal were to subject government contractors to on-again, off-again lawsuits. Nor do they explain why, when Congress created one-case-at-a-time rules elsewhere, Pet.Br.45-46, it consistently used "different language" and "substantially different structure than the FCA's first-to-file provision." Resp.Br.52 & n.16. Most damning of all, neither Carter nor the government has *any* response to the fact that when the FCA's drafters sought to create a one-case-at-a-time rule in the *very bill* containing the first-to-file bar, they said so plainly. Pet.Br.47-48 (citing H.R. Rep. No. 99-660, at 4 (1986)).[15]

2. Carter and the government make much of the bar's dual prohibition on bringing a related action or intervening, arguing the intervention bar would be "nonsensical" if applied to dismissed actions. Resp.Br.49; accord U.S.Br.28. But as Carter recognizes, see Resp.Br.49 n.14 (bar is "two sentences * * * prohibit[ing] two different actions"), the provision is disjunctive, and only one portion even *uses* the term

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The government quotes statements of purpose relating to the 1986 FCA amendments generally, not the first-to-file bar. See *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005) (analyzing policy of "[t]he FCA"); S. Rep. No. 99-345, at 2 (1986) (U.S.Br.29).

[15] 31 U.S.C. §3733(j)(2)(A) (U.S.Br.28) does not use "pending" as a temporal limitation.

"pending"—i.e., it bars a private party from "bring[ing] a related action based on the facts underlying the pending action" *or* "interven[ing]." See generally *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003) ("a limiting clause or phrase *** modi[ies] only the *** phrase that it immediately follows"). It therefore does not follow that "'pending' must have the same meaning in the context of 'intervention' and 'bringing an action,'" Resp.Br.49. The D.C. Circuit unanimously rejected the related argument that a second suit must be capable of falling under both prohibitions to be barred. See Verizon Br.11.

3. The claim of support from "nearly every" (Resp.Br.50) or "[a]ll but one" (U.S.Br.26) of the circuits to consider the question is silly: There are *two* other decisions, and the government concedes one offers only "dicta." U.S.Br.26 (citing *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956 (10th Cir. 2009)). The D.C. Circuit "reviewed those decisions" and found their discussions to be dicta, "unaccompanied by any reasoning," or both. *Shea*, 748 F.3d at 344. Carter is flatly wrong that the D.C. Circuit is "split on the definition of pending." Resp.Br.51. Judge Sentelle, who authored both *Shea* and *U.S. ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011), observed that the meaning of "pending" was "not reached in *Batiste*." *Shea*, 748 F.3d at 343.

That the government must dismiss as a "mistake" its prior considered view in *U.S. ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361 (7th Cir. 2010), U.S.Br.27-28 n.8, shows at a minimum that the statutory text does not *unambiguously compel* the panel's reading, as Carter and the government claim.

The government advanced *KBR*'s reading in *Chovanec*, with the same certainty it now advocates the opposite position.

B. The Panel's Interpretation Frustrates The Statutory Purpose

1. Although Carter and his *amici* argue extensively about statutory purpose, Resp.Br.53; U.S.Br.29-34. they begin from a flawed premise. The government claims that the first-to-file bar's *only* purpose is to "encourag[e] whistleblowers to come forward." U.S.Br.29 (quotation omitted). Not so. While other FCA provisions encourage whistleblowers by offering cash bounties, the first-to-file bar *limits* such suits, to balance "adequate incentives for whistle-blowing insiders" against "discouragement of opportunistic plaintiffs who have no significant information to contribute." *Graham Cnty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010).

The first-to-file bar serves "twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *U.S. ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); *Shea*, 748 F.3d at 342-343. The question is not whether narrowly construing the first-to-file bar would increase the number of *qui tam* suits as a "supplement to government actions" (U.S.Br.30), but rather "the precise scope of" the balance Congress struck in §3730(b)(5). *Graham Cnty.*, 559 U.S. at 298.

2. Even accepting the responsive briefs' account of the law's purpose, the panel's reading thwarts it.

KBR's interpretation "reward[s] the first" "whistle-blower[] to come forward," *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005) (U.S.Br.29); Carter's reading rewards infinite successors. This case, with its recurrent re-filing of a single complaint, and *Shea*'s repeated suits against a defendant for the same alleged conduct, Verizon Br.13-15, are not outliers.[16] Permitting repetitive suits implicates concerns about "wast[ing]" judicial and investigatory resources (Resp.Br.57); indeed, the government does not disavow (cf. U.S.Br.27 n.8) its observation in *Chovanec* that serial complaints "waste Government resources." Pet.Br.55.

Serial suits undermine the first relator's recovery no less than "simultaneous" ones. Cf. Resp.Br.51; U.S.Br.30. Carter and the government offer *no response* to well-documented pressures that demands from later relators and reduced settlement offers place on first-filing relators' recoveries. Pet.Br.55-56. Thus, the threat of repetitive litigation may indeed "fragment[]" the first relator's recovery—the very concern the government *concedes* the first-to-file bar seeks to avoid. U.S.Br.29. Conversely, where a late-arriving relator offers truly useful information, some courts allow the first-filer to join a second plaintiff by amending a complaint. See Taxpayers Against Education Fraud Br.28-29; see also *U.S. ex rel. Boise* v.

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[16] See also *U.S. ex rel. Powell* v. *Am. InterContinental Univ., Inc.*, No. 1:08-cv-2277, 2012 WL 2885356, at *2, *6, *9 (N.D. Ga. July 12, 2012) (*four* previously dismissed actions against same defendant); *U.S. ex rel. Sandager* v. *Dell Marketing, LP*, 872 F. Supp. 2d 801, 805-806, 807-811 (D. Minn. 2012) (*three* earlier-filed lawsuits by two relators).

Cephalon, Inc., No. 08-cv-287, 2014 WL 5089671, at *5 (E.D. Pa. Oct. 9, 2014) (permitting joinder where "plaintiffs have consented to join together and share any proceeds of their suit due to the real or perceived advantage the additional relators bring").

3. While Carter and his *amici suggest* that claim preclusion and estoppel protect against repetitive litigation, they are studiously vague about whether they *actually* do so. See U.S.Br.30 ("may prevent * * * subsequent cases"); *id.* at 33 ("can have preclusive effects"); Resp.Br.60. None dispute that preclusion is an uncertain shield, requiring litigation of complex preclusion issues, including whether a nonparty is bound by the resolution of the first suit and whether settlement of a first-filed *qui tam* binds other relators. Pet.Br.56-57. Any preclusive effect against the government (U.S.Br.33) may not cover *non-intervened* cases, which represent the vast majority of FCA suits.[17]

The government is mistaken that after an initial suit is dismissed, res judicata is a defendant's "*only* potential source of protection against sequential *qui tam* suits," U.S.Br.33, and that applying the first-to-file bar by its terms would "subvert the established rule that non-merits dismissals do not have res judicata effect," *id.* at 9; accord *id.* at 30, 32. The responsive briefs identify no textual basis for distinguishing between "merits" and "non-merits" dismissals. Indeed, it is not *dismissal* that has preclusive effect, but

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[17] Carter suggests that "relators have [not] waited to file" in the Fourth, Seventh or Tenth Circuits. Resp.Br.59 n.21. But those cases were decided far too recently to discern whether relators have delayed filing cases.

the first relator's "bring[ing] an action," and thus disclosing "substantially all material evidence and information the person possesses," §3730(b)(5), (b)(2). There is nothing unusual, much less "subver[sive]," about such conduct barring later opportunities to assert claims on behalf of the United States: The *entire purpose* of the FCA's limitations provisions is to "expand the circumstances in which future litigants can be precluded." U.S.Br.34.

The general effect of non-merits dismissals is not before the Court. At least one circuit has held that "the first-to-file bar [does not apply] * * * when the first action is jurisdictionally defective because the relator was not an original source of publically disclosed information." *Campbell*, 421 F.3d at 818; contra U.S.Br.32. Other courts have divided about whether the first-to-file bar applies when an earlier complaint was not adequately pleaded under Federal Rule of Civil Procedure 9(b). Compare *Walburn* v. *Lockheed Martin Corp.*, 431 F.3d 966, 972-973 (6th Cir. 2005) (no), with *Batiste*, 659 F.3d at 1210 (yes). The government has taken the former view, even as it assumes the opposite position here. Compare *Batiste*, 659 F.3d at 1210, with U.S.Br.33.

A truly frivolous complaint may not be "related" to a later suit that provides broader allegations and information. Cf. *Natural Gas Royalties*, 566 F.3d at 964 (claims against entities not named as defendants in earlier *qui tam* suit not "related"). Moreover, enforcing the plain terms of the first-to-file bar would "encourage the parties to present their best arguments * * * in the first instance and thereby save judicial time," *Spilman* v. *Harley*, 656 F.2d 224, 228

(6th Cir. 1981) (discussing estoppel), rather than treating subsequent complaints as "Mulligans."

4. Carter intones that frivolous first-filed suits will render KBR "forever immune." Resp.Br.47; see also *id.* at i, 16, 54 ("never face a jury"), 55 n.18, 58, 61. But he eventually concedes that a defendant is *not* "immun[e]," because the *government* remains free to sue. See 31 U.S.C. §3730(b)(5); Resp.Br.61 n.23. And for all the paeans to the value of "whistleblower" lawsuits, and concerns about "the government's limited resources," U.S.Br.32, no one disputes that *virtually all* FCA recoveries come from suits *the government* litigates. Non-intervened cases account for just 3.6% of recovered funds since 1986, and "more than 90% [of them are] dismissed as frivolous or otherwise without merit." Chamber.Br.16; cf. Nat'l Whistleblower Ctr.Br.8-9 (discussing recoveries from intervened *qui tam* actions). Claims of foregone relator tips are likewise overstated. Because subsequent relators may file without knowledge of an earlier still-sealed case, the government will often have the benefit of disclosures from both first- and later-filed cases. Cf. U.S.Br.32 (suggesting government's "lack of inside knowledge" would prevent it from bringing suit after first complaint is dismissed).[18]

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[18] Although Carter denigrates it as "poorly pled" (Resp.Br.54), the *Thorpe* complaint (J.A.525-538)—drafted by experienced *qui tam* attorneys—made the same material allegations as his. The *Thorpe* relators, like Carter, were former employees of KBR (or subsidiaries) who worked at bases in Iraq and Afghanistan. They alleged firsthand knowledge of time-card fraud (one had been "in charge of processing time-sheets"—better positioned than Carter, a water-purification operator). Compare First Am. Compl. 6, *U.S. ex rel. Thorpe* v. *Halliburton Co.*, No. 05-cv-8924

That the government repeatedly reviewed Carter's allegations (and those in many other related cases) and declined to intervene counsels skepticism about his breathless account of harm to troops. Moreover, for all Carter's current emphasis on improper water purification, those claims were dismissed in 2009, Pet.App.50a; his current claim is *time-card* fraud.

5. Nothing in KBR's reading "disrupt[s] th[e] balance" (U.S.Br.31) between the first-to-file and public disclosure bars. As KBR explained without contradiction, the two bars apply in different procedural postures and to different sets of claims. Pet.Br.49-52. Applying the first-to-file bar to "disallow" an action "allow[ed] under the original-source exception" (U.S.Br.32; accord Resp.Br.53), simply reflects the different operation of the various FCA bars. All agree a subsequent lawsuit by an "original source" is barred before a first-filed suit has been dismissed or reduced to judgment. And *after* a first-filed lawsuit has been dismissed, the first-to-file bar's triggering event (filing a *qui tam* suit) involves a substantial disclosure of information to an official statutorily obligated to "diligently" investigate it, 31 U.S.C. §3730(a), as compared to public disclosure in a press report or

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(C.D. Cal. June 19, 2008) (Doc. 21) ("KBR routinely instructed the LOGCAP III employees to charge no less than 12 hours of work per day, 7 days per week, on their timesheets even though most of those hours were never worked"), with J.A.165 (Carter alleging KBR policy of entering at least "twelve hours of work per shift, notwithstanding the number of hours actually worked"). *Thorpe* was dismissed not for any pleading deficiency, but because relator's counsel withdrew.

other source about which government officials may not even be aware. Pet.Br.54-55.

Nor is this reading tantamount to reinstating the repealed "government knowledge" bar. The first-to-file bar is triggered only after the first relator makes an extensive disclosure to the Attorney General. 31 U.S.C. §3730(b)(2). The government knowledge bar, by contrast, applied *however* the government learned of information. The disclosure accompanying a *qui tam* suit places the government in a far better position to pursue fraud than did the former knowledge bar. See, *e.g.*, *Safir* v. *Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978) (Friendly, J.) (finding it "rather curious" that under government-knowledge bar, "an informer who makes only a partial or merely conclusory disclosure to the United States before filing suit should be free to carry on a [q]ui tam action").

Concerns about supposedly "draconian" (U.S.Br.31) applications are overstated; the first-to-file provision simply governs third parties' ability to "seek remuneration although they contributed nothing to the exposure of fraud," *Graham Cnty.*, 559 U.S. at 296 n.16, by providing *previously disclosed* information. Congress sensibly concluded that the small possibility of additional recovery, after a first relator disclosed "all material evidence and information" and the government (by hypothesis) declined to intervene, does not justify successive "opportunistic" lawsuits imposing systemic costs on courts, investigators, and government contractors. See pp. 18-20, *supra*.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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AND
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v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, petitioners submit this supplemental brief to address the relevance to the pending petition for a writ of certiorari of several intervening lower-court decisions.

A. Courts And Litigants Nationwide Continue To Invoke The Panel Decision To Toll Indefinitely Civil Fraud Claims Having Nothing To Do With War

As the petition explains, the panel decision is only the most prominent case in a growing series of judicial opinions allowing both self-interested private relators and the government to invoke the Wartime Suspension of Limitations Act ("WSLA")—a *criminal code* provision suspending statutes of limitations for fraud "offense[s]" when prosecutors are distracted by war—to revive time-barred *civil* fraud claims having nothing to do with war or defense contracting, and to toll such claims indefinitely. Pet. 3, 21-24. Although the petition identified a well-recognized lower-court conflict, new authority appeared even in the short interval between the petition and reply brief, including a decision rejecting the reasoning of the court below. Reply 2 & n.3; *id.* at 7 & n.8. Now, only two weeks later, further authority has joined the developed conflict.

1. Since petitioners' reply brief, another published decision has recognized the conflict of authority on the WSLA and invoked the panel opinion here to authorize indefinite tolling. There, the government seeks "hundreds of millions of dollars" in damages and penalties for the decidedly non-war-related conduct of "originating and underwriting government-

insured home mortgage loans." *United States* v. *Wells Fargo Bank, N.A.*, --- F. Supp. 2d ---, 2013 WL 5312564, at *1, *10 (S.D.N.Y. Sept. 24, 2013). While dismissing common-law claims as plainly time-barred, the court held that the WSLA had tolled False Claims Act ("FCA" or "Act") allegations dating back not only to the 2002 Authorization for Use of Military Force Against Iraq (which the panel here cited, Pet. App. 12a), but also the 2001 Authorization for Use of Military Force following the September 11 attacks. 2013 WL 5312564, at *11. The court also concluded that, as of September 24, 2013, "there has been neither a Presidential proclamation, with notice to Congress, nor a congressional resolution suspending hostilities" sufficient to terminate tolling. *Ibid.* The court expressly acknowledged one of the conflicts the petition squarely presents: "[c]ourts have disagreed about whether the conflicts in Afghanistan and Iraq put the United States 'at war' within the meaning of the [WSLA] given the absence of a congressional declaration of war." *Id.* at *11 n.10; accord Pet. I, 17-18.

Relying heavily on the Fourth Circuit's ruling and rationale, *Wells Fargo* rejected the possibility of a limiting interpretation—i.e., that the WSLA "applies only to *criminal* offenses"—and in the process acknowledged *another* division of authority the petition squarely presents. 2013 WL 5312564, at *13 (rejecting *United States* v. *Weaver*, 107 F. Supp. 963 (N.D. Ala. 1952), cited at Pet. 15); but cf. *United States ex rel. Emanuele* v. *Medicor Assocs.*, No. 10-cv-245, 2013 WL 3893323, at *7 (W.D. Pa. July 26, 2013) (WSLA inapplicable to non-intervened civil FCA actions, cited at Reply 7 n.8). Buoyed by the panel's

sweeping holding and rationale here, and, like the panel, invoking the (unspecified) general "purpose of the Act," *Wells Fargo* explicitly held that the WSLA extends to "matters * * * having nothing to do with wartime contracting." 2013 WL 5312564, at *13. The court saw no need for any nexus between the alleged fraud and the conflict authorizing tolling: "it makes no difference that the fraud in this case [was] * * * unrelated to the Iraqi or Afghani conflicts." *Id.* at *14. Thus, just one month after the brief in opposition was filed, two things it disputed can no longer seriously be contested: the issues the petition presents "recur" frequently, see Opp. 12; and it is not "speculation" that the WSLA will be applied outside the defense context, *id.* at 16.

2. *Qui tam* litigants, predictably, continue to exploit the favorable law in some jurisdictions. One pending case, *United States ex rel. Landis* v. *Tailwind Sports Corp.*, involves claims with no plausible link to war or defense contracting: allegations that Lance Armstrong and associated entities employed a doping scheme to win bicycle races and secure $40 million in sponsorship money from the U.S. Postal Service, based on alleged conduct dating to *1996*. The private relator has invoked the WSLA, in heavy reliance on the panel decision here. See Relator's Mem. in Opp'n to Def. Lance Armstrong's Mot. to Dismiss, *United States ex rel. Landis* v. *Tailwind Sports Corp.*, No. 1:10-cv-976 (D.D.C. Sept. 23, 2013) (Doc. 109) ("Landis Br.").

Arguing that the WSLA tolls claims for even "decidedly unmilitary" issues, the relator in *Landis* argues that the 2001 and 2002 Authorizations for Use

of Military Force put the United States "at war" for purposes of the WSLA—although he, too, acknowledges that "courts are divided as to whether [the pre-amendment WSLA] requires a formal declaration of war" to toll the statute of limitations. Landis Br. 4, 6. He quotes extensively from the panel decision here, among other things as justification to depart from cases giving the term "war" its ordinary meaning of a formally declared conflict. *Id.* at 6-8 & n.6. And the relator there invokes the panel for the proposition that intervening events did not provide formalities sufficient to terminate tolling. *Id.* at 9. Finally, the brief explicitly argues against giving effect to the FCA's 10-year "statute of repose," expressly endorsed in *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013). Landis Br. 12-13; cf. Pet. 2, 15-17 (noting inconsistency of *Gabelli* with indefinite tolling under WSLA); Reply 6-7 (same).

3. Despite its own aggressive and widespread recent invocation of WSLA tolling, see Reply 5; Reed Albergotti, *U.S. Uses Wartime Law to Push Cases into Overtime*, Wall St. J., Apr. 16, 2013, at C1 ("the government's use of the law has more than doubled" just since 2008, and the government has invoked the provision to toll fraud claims more in just the past four years than in the previous 47 combined), the government has been conspicuously silent about the WSLA in *Landis*. Perhaps perceiving risks from overreach given the pendency of this petition, the government's brief in this intervened *qui tam* uncharacteristically relies on an alternate ground for tolling, content to let the relator to carry the WSLA banner without comment one way or the other. See United States Opp'n to Def. Lance Armstrong's Mot. to Dismiss at 9-20,

United States ex rel. Landis v. *Tailwind Sports Corp.*, No. 1:10-cv-976 (D.D.C. Sept. 23, 2013) (Doc. 114). This shifting and strategic litigating position deprives private parties of notice about the government's view of potential indefinite tolling; calling for the views of the Solicitor General would provide beneficial public guidance on this critical and frequently recurring issue.

B. Respondent's Supposed Vehicle Problem Has Been Resolved

Respondent argued that this case is not ripe for review because, on remand from the Fourth Circuit's decision in this case, petitioners filed a motion to dismiss the complaint under the FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4). Opp. 5 n.4, 6. Respondent's concerns about possible "moot[ness]" were mistaken on their own terms, see Reply 11-12, but in any event have now vanished: On September 19, 2013, the district court adjudicated the motion, holding that the public disclosure bar does not require dismissal of Relator's claims. See Mem. Op., *United States ex rel. Carter* v. *Halliburton Co.*, No. 1:11-cv-602 (E.D. Va. Sept. 19, 2013) (Doc. 87).

Unless this Court grants review, respondent will be poised to file his *fourth* identical complaint invoking a statute Congress intended to prohibit "copycat actions that provide [the government] no additional material information," *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011), despite the fact that *two* other relators already brought those allegations to the government's attention, Pet. 6. Without a doubt, these are important questions that this Court will have to address eventually, but

the dramatic implications of the Fourth Circuit's opinion for *all* government contracting, in every industry, are apparent right now. This Court's review is urgently needed.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari and reply brief, the petition should be granted.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States has formally taken the position that, because of a *criminal code* tolling provision for fraud "offenses" enacted to accommodate law-enforcement officials distracted by wartime duties, no statute of limitations now restricts *civil actions* under the False Claims Act ("FCA"). Under this view, limitations have been tolled on *all* FCA actions, brought by the government or a private relator, war-related or not, since at least the 2001 Authorization for the Use of Military Force, if not the First Gulf War. And the limitations period will remain tolled indefinitely until Congress or the President takes the unprecedented (and politically unlikely) step of formally declaring *all* conflicts involving the United States to be over. Though the government concedes that the Wartime Suspension of Limitations Act ("WSLA") originally addressed only crimes, it claims that the deletion of two words, unremarked by Congress, expanded the statute's sweep to civil actions.

The government's current view reverses the criminal-only position it took before this Court at a time when it routinely litigated WSLA cases. The government does not even mention, much less attempt to reconcile, this Court's admonitions that the WSLA must be "narrowly construed" as "an exception to a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law," *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953); *United States* v. *McElvain*, 272 U.S. 633, 639 (1926) (predecessor provision "is to be construed strictly"), or the FCA's "absolute" 10-year statute of repose, see Pet. 15-16. See generally *CTS Corp.* v. *Waldburger*, No. 13-339 (June 9, 2014), slip op. 7

("Statutes of repose * * * generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control.").

There's more. The government now says the FCA, which it previously told this Court bars suits "which the government is capable of pursuing itself" (as when it is "already on the trail of the alleged fraud"), Br. of U.S. as *Amicus Curiae* 10, *Graham Cnty. Soil & Water Conserv. Dist.* v. *U.S. ex rel. Wilson* (U.S. 2010) (No. 08-304) ("*Graham Cnty.* U.S.Br."), actually permits relators to bring sequential lawsuits alleging identical claims already well-known to the government, as long as they proceed one case at a time. That is contrary to the government's prior representation that under the first-to-file bar, "even a first-in-time *qui tam* complaint * * * which is subsequently dismissed prevents a second-in-time complaint from proceeding," U.S. Br. 26, *Chovanec* v. *United States*, 606 F.3d 361 (7th Cir. 2010) ("*Chovanec* U.S.Br."), http://goo.gl/uscYwn. The combined effect of the government's two reversals is that self-interested relators can hale government contractors into court to litigate identical claims dating to the last century again, and again, and again.

The government's current position represents a remarkable enough assertion of authority by the Executive Branch—endorsed by a court with among the nation's busiest FCA dockets and jurisdiction over most government contractors, see Chamber *Amicus* Br. 20-21; NDIA *Amicus* Br. 2-3—that it would warrant review under this Court's Rule 10(c) even absent

disagreement among the courts.[1] But there is disagreement: a "squar[e] conflict[]" among circuits on the first-to-file issue, Br. for U.S. Supporting Reh'g En Banc 3, *U.S. ex rel. Shea* v. *Cellco P'ship*, No. 12-7133 (D.C. Cir. May 15, 2014), and rampant disagreement among the lower courts on the WSLA issue, see pp. 7-8, *infra*. That the government has taken positions on *both* sides of *both* issues underscores the extent of confusion and the strong arguments that the Fourth Circuit erred. The many cases decided while this Court's invitation was pending confirm that both issues are important and arise frequently; the government's expansive reading will further promote litigation.

Both issues have been fully examined by a variety of courts and are ready for this Court's review. The government identifies no vehicle problems that would keep this Court from resolving both issues, and does not dispute that this case is an excellent vehicle for addressing the interaction between the two provisions. Prompt review is necessary to avoid "dire effects" on government contractors. Pet. App. 46a (Agee, J., concurring in part and dissenting in part); Pet. 23 (detailing "grave implications").

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[1] Br. of U.S. as *Amicus Curiae* 17, *Air Wis. Airlines Corp.* v. *Hoeper* (U.S. 2013) (No. 12-315) (successfully urging review because of decision's "possible impact" although it "does not conflict" with "any decision of * * * any other appellate court"); Br. of U.S. as *Amicus Curiae* 17 n.1, *Republic of Iraq* v. *Beaty* (U.S. 2008) (No. 07-1090) (same, "[i]n view of the [issue's] importance" despite "no circuit conflict"); Br. of U.S. as *Amicus Curiae* 8, *Chamber of Commerce* v. *Candelaria* (U.S. 2010) (No. 09-115) (same).

A. The WSLA Only Applies To Crimes

1. The government's principal contention is that Congress's 1944 deletion of two words—"now indictable"—from a tolling provision that "originally limited the WSLA's application to criminal fraud offenses" (U.S.Br.11)—extended its reach to civil provisions. The government neglects to note that this Court construed that language in the WSLA's predecessor just as petitioners have (Pet. 14; Reply 3), as making tolling "applicable to offenses * * * *not already barred.*" *McElvain*, 272 U.S. at 637 (emphasis added). Congress deleted those words as redundant because another provision of the 1944 law specified that tolling "shall not apply to acts, offenses, or transactions which are already barred." Contract Settlement Act of 1944, 58 Stat. 649, 667.

We need not guess how Congress would write a tolling provision for both criminal and civil matters: It did so two months after enacting the WSLA, addressing tolling not for "offenses," but "*violations* of the antitrust laws * * * now indictable *or subject to civil proceedings.*" Act of Oct. 10, 1942, ch. 589, 56 Stat. 781 (emphasis added).[2] The idea that Congress

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[2] The government emphasizes that the 1944 amendments were within an enactment that "was largely civil in nature." U.S.Br.11. But that law simply added "criminal prosecutions for violations of the Surplus Property Act * * * to the list of prosecutions" covered by the WSLA. U.S.Br. 26-27, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362) ("*Koller* U.S.Br."); accord *United States* v. *Smith*, 342 U.S. 225, 227-228 (1952) (law extended to "offenses of the type likely to be committed during the post-hostilities period"). The criminal nature of the "offense[s]" is confirmed by the fact that the relevant section was captioned "PROSECUTION OF FRAUD," § 19(b), 58 Stat. 667.

would transform a tolling provision limited to *criminal prosecutions* to one also encompassing civil suits by the ambiguous step of deleting two words, without any reference in legislative history, runs counter to the rule that "Congress * * * does not alter the fundamental details of a [statutory] scheme in vague terms or ancillary provisions." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Congress's failure to address the WLSA's interaction with the FCA's (civil) statute of repose is further indication it applies only in criminal cases. *CTS Corp.*, slip op. 11-15.

While the government argues that no post-1944 amendment "limit[ed] the WSLA's reach to crimes," U.S.Br.13, it ignores indications that its criminal-only scope was already well understood. Four years after the supposedly transformational 1944 amendment, when Congress comprehensively recodified the criminal law to "mak[e] it easy to find the criminal statutes," 94 Cong. Rec. 8906 (daily ed. June 18, 1948), it placed the WSLA in the new criminal code's chapter on "limitations." Cf. *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997) ("Kansas' objective to create a civil proceeding is evidenced by its placement of the Act within the Kansas probate code, * * * instead of the criminal code."). That chapter divided "offenses" into two obviously criminal categories, "capital" and "not capital," and *every* use of "offense" referenced a crime, 62 Stat. 827-828. (That remains true. See 18 U.S.C. §§ 3281-3301.) Whatever modern dictionaries may say, U.S.Br.8-9, limiting "offense" to crimes accords with the word's ordinary meaning at the time of the WSLA's enactment: "A crime or misdemeanor; a breach of the criminal laws." *Black's Law Dictionary*

1232 (4th ed. 1951). Cf. *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 610-611 (1987) (looking to contemporaneous definitions to construe statute).

The government identifies no other provision of title 18 (U.S.Br.9) that uses "offense" to describe a civil violation; its sole example is 93 years old, see U.S.Br.9 (citing *United States* v. *Hutto*, 256 U.S. 524 (1921)), and it concedes in a footnote that even that statute has been amended to indicate that "offense" means only crimes, by referring to less serious "offense[s]" as "misdemeanors." U.S.Br.10 n.3. But the government fails to note that the 1948 statute codifying WSLA provided that "*any other* offense [besides a felony] is a misdemeanor," 62 Stat. 684 (codified at 18 U.S.C. § 1) (repealed 1984) (emphasis added), clearly limiting the term to crimes.

2. The government can maintain that "[a]pplying the WSLA to civil FCA violations furthers the WSLA's purposes" (U.S.Br.13) only by editing the legislative history beyond recognition. As this Court explained, explicitly referencing the *criminal* statute of limitations (the WSLA's neighbor, 18 U.S.C. § 3282), Congress enacted the WSLA because while "'[d]uring normal times the present 3-year statute of limitations may afford * * * sufficient time to investigate, discover and gather evidence *to prosecute frauds* against the Government,'" during wartime, "'*[t]he law-enforcement branch* of the Government is * * * busily engaged in its many duties, including *enforcement of the espionage, sabotage, and other laws*,'" preventing it from "'discover[ing] and punish[ing]'" such crimes. *Smith*, 342 U.S. at 228-229 n.2 (quoting S. Rep. No. 1544, 77th Cong., 2d Sess., at 1-2 (emphases added));

id. at 228-229 ("the fear was that the law-enforcement officers would be [too] preoccupied"). Congress expressed no concern about distraction of *civil* enforcement officials, much less private relators, who suffer no war-related resource constraints; extending the WSLA to them "directly thwart[s]" congressional intent to "combat[] fraud quickly." Pet. App. 43a, 45a (Agee, J., concurring in part and dissenting in part).

3. The government argues that review is not warranted because "[e]very court of appeals to consider the question has held that the WSLA applies in civil fraud cases" and "only one district court" besides the one below has concluded otherwise. U.S.Br.15. But the government ignores decisions rejecting application of the WSLA to private *qui tam* fraud suits, including three decided during the pendency of this petition.[3] The number of recent decisions the government cites (U.S.Br.16) demonstrates that the issue recurs frequently. There doubtless would be still more, but the FCA's treble-damages provision spurs settlement. Cf. Jeffrey M. Perloff et al., *Antitrust Settlements & Trial Outcomes*, 78 Rev. Econ. & Stat. 401, 408 (1996).

The government does not dispute the panel's observation that "courts are in conflict" about "whether the pre-amendment WSLA requires a formal declara-

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[3] See *Hericks* v. *Lincare Inc.*, No. 07-cv-387, 2014 WL 1225660, at *14 n.16 (E.D. Pa. Mar. 25, 2014); *U.S. ex rel. Bergman* v. *Abbot Labs.*, Civ. No. 09-4264, ___ F. Supp. 2d ___, 2014 WL 348583, at *16 (E.D. Pa. Jan. 30, 2014); *U.S. ex rel. Emanuele* v. *Medicor Assocs.*, No. 10-cv-245, 2013 WL 3893323, at *7 (W.D. Pa. July 26, 2013).

tion of war," Pet. App. 10a. Indeed, it *concedes* "substantial doubt" about that issue. U.S.Br.16. The government contends that the issue "is of no continuing importance" because of the 2008 amendment. *Id.* at 17. That might be so if stale claims became barred; but the government contends that claims can still be brought dating to the late 1990s—a period of wide-ranging U.S. military action, growth in Medicare and Medicaid, and extensive federal reliance on private contractors. The number of affected cases remains vast.

4. At a time when the government had been litigating WSLA cases continuously since its enactment, it represented to this Court that the 1944 amendments suspended "limitations on *criminal* violations of the Surplus Property Act," but "[b]y contrast, Congress provided no suspension of limitations on *civil* [violations] under Section 26 [of the Act]," *Koller* U.S.Br.8 (emphasis added). With the benefit of hindsight—and billions in potential FCA revenues[4]—the government has revisited that view. While the government contends that "[t]he WSLA was not at issue in that case," U.S.Br.16, its *Koller* argument explicitly contrasted the Act's criminal and civil provisions to show civil provisions were compensatory and thus (at that time) subject to *no* statute of limitations. Indeed, the government suggested the same would be true under the "almost identical" language of the *False Claims Act*. *Koller* U.S.Br.8. And the brief *did* "discuss * * * the sequence of enactments" resulting

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[4] See, *e.g.*, Dep't of Justice, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (Dec. 20, 2013).

in the WSLA's then-current wording, contra U.S.Br.16; it specifically discussed that history and how the 1944 amendments (on which the government now relies) changed the text, *Koller* U.S.Br.26-27. The *Koller* brief suggests that people familiar with the WSLA's enactment and early use would consider the government's current arguments insubstantial.

B. Sharp Conflict Over The First-to-File Bar Warrants Review

1. The government concedes facts sufficient to warrant review: Circuits are split on a recurring and important question: "whether the first-to-file provision applies when no action involving the same underlying facts remains 'pending' when the relator files her suit." U.S.Br.20. The government has acknowledged the scope of an FCA bar is "an important legal issue." *Graham Cnty.* U.S.Br.7; see also Reply 1 & n.2. The government's support of rehearing *en banc* in *Shea*, and its repeated hedging that review is not warranted "at this time," U.S.Br. 8, 20, suggest that it too will support review when the split persists.

The government argues the disagreement is "narrow" and "may resolve itself" (U.S.Br.21)—i.e., *if* the D.C. Circuit were to decide to rehear *Shea* en banc, and *if* it ultimately reverses the panel. Even so, the panel decision would still reflect pervasive confusion and disagreement about an important issue, and show the strength of arguments that the Fourth Circuit erred. The Solicitor General has previously (and successfully) urged review despite a pending en banc proceeding (recommending that, at a minimum, the Court hold the case pending resolution of rehearing). See U.S. Br. 7-8, *Henderson* v. *United States*, 133

S. Ct. 1121 (2013) (No. 11-9307). And the chances of resolution are slight, given the tiny number of cases (a fraction of one percent) the D.C. Circuit rehears en banc. See Fed. Bar Council, *En Banc Practices in the Second Circuit* 6 (2014); accord Admin Ofc. of U.S. Courts, *Judicial Bus. of the U.S. Courts* (2013), Table S-1, http://goo.gl/hSfFoV.

In any event, the government understates the level of disagreement. As both the *government itself* and the leading FCA treatise have explained, the Ninth Circuit's rationale in *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (2001), "appl[ies] with equal force to [require dismissal of] earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." 1 John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.03[C][2][b] (4th ed. CCH 2012); accord *Chovanec* U.S.Br.26.

2. As the government told the Seventh Circuit, "a first-in-time *qui tam* complaint * * * which is subsequently dismissed prevents a second-in-time complaint from proceeding." *Chovanec* U.S.Br.26; accord *id.* at 20. That is so, the government explained, because allowing successive complaints "will only encourage other potential whistleblowers to wait until someone else comes forward first," and "will provide no benefit to the Government" because the first complaint ensures "the Government knows the essential facts of a fraudulent scheme, [and] has enough information to discover and pursue related frauds." *Id.* at 18-19. Allowing serial complaints would, in the government's prior view, "waste Government resources" by requiring investigation of repetitive claims and

"dilute the Government's recoveries without providing any benefit." *Id.* at 19. In short, the government's previous longstanding position is indistinguishable from petitioners'. Compare Pet. 28-30, with *Chovanec* U.S.Br. 18-20, 26.

The government ignores compelling textual, doctrinal, and practical reasons why the Fourth Circuit erred. As *Shea* explained, the most natural reading of the phrase "pending action" is "the referential one; it serves to identify which action bars the other," as "shorthand for 'first-filed action'"—because Congress did not (as the government and Fourth Circuit would have it) say the bar applies "while the first action remains pending" or if another relator "has pending" another case. *U.S. ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 2014 WL 1394687, at *5 (D.C. Cir. 2014). And the Solicitor General offers no response to the concern that "reading the bar temporally would allow related *qui tam* suits indefinitely—no matter to what extent the government could have already pursued those claims based on earlier actions." *Ibid.*; Pet. 24-25 ("infinite number of copycat *qui tam* actions"). That concern is hardly theoretical: Relator has now filed a *fourth* identical copy of his original complaint, initiating a new district court case and requiring yet *another* round of briefing and argument on grounds for dismissal and the first-to-file bar.

The government's newly minted position gives relators a direct financial incentive to delay filing to allow claims to accrue, thereby delaying disclosure of fraud allegations to the government. The risk of a first-filed suit triggering the public disclosure bar, U.S.Br.20 (citing 31 U.S.C. § 3730(e)(4)(A)), will not

affect "an original source of the information." *Ibid.* As the lengthy litigation of "original source" status in this case shows, see Supp. Br. 5, the public-disclosure bar is a sufficiently fact-intensive, time-consuming inquiry that it poses no significant deterrent to delaying a filing in pursuit of a bigger recovery. The government is studiedly vague about whether a merits judgment "*may* prevent the filing of subsequent cases." U.S.Br.19 (emphasis added). And the government's own statistics make it easy to "predict how or when an earlier-filed suit will be resolved" (U.S.Br.20) in most cases: As here, the vast majority of non-intervened, first-filed suits are dismissed, but not before inflicting enormous litigation costs. Chamber *Amicus* Br. 13.

CONCLUSION

The petition should be granted. Alternatively, the petition should be held pending the D.C. Circuit's resolution of any *en banc* proceedings in *Shea*.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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In the Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL, PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS REGARDING INTERVENING DECISION

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SUPPLEMENTAL BRIEF FOR PETITIONERS REGARDING INTERVENING DECISION

Pursuant to this Court's Rule 15.8, petitioners submit this supplemental brief to address the relevance of an intervening lower-court decision rejecting application of the Wartime Suspension of Limitations Act ("WSLA") to civil fraud claims.

As petitioners have explained, the government and private relators nationwide are routinely invoking the WSLA in seeking to toll civil fraud claims unrelated to war, creating a division of authority in lower courts. Pet. 17-18; Reply 7 & n.8; Supp. Br. 1-5. Even during the pendency of this petition, a number of new decisions have issued on both sides of the divide, some allowing tolling, and others correctly holding the WSLA inapplicable to civil *qui tam* suits.

The division has grown still deeper. On June 19, 2014, the U.S. District Court for the District of Columbia held in a published decision that the WSLA has no application tc civil False Claims Act ("FCA") claims alleging that Lance Armstrong and associated entities had engaged in a doping scheme to win bicycle races, in violation of sponsorship agreements with the U.S. Postal Service. *U.S. ex rel. Landis* v. *Tailwind Sports Corp.*, No. 10-cv-976, ___ F. Supp. 2d ___, 2014 WL 2772907 (D.D.C. June 19, 2014); Supp. Br. 3-5 (discussing allegations in *Landis*).

Judge Robert L. Wilkins of the D.C. Circuit, sitting by designation, held that the WSLA did not apply to revive the time-barred claims in that case, and

rejected the relator's request for tolling.[1] Judge Wilkins discussed at length—and ultimately found dispositive—this Court's decision in *Bridges* v. *United States*, 346 U.S. 209 (1953), which held that the WSLA did not suspend the statute of limitations for criminal false statements in naturalization proceedings. 2014 WL 2772907, at *20. *Bridges*, Judge Wilkins explained, "noted that the legislative history of WSLA indicated a purpose to allow the government additional time to investigate *and prosecute* 'war frauds' and 'war contracts.'" *Id.* at *20 & n.26 (quoting *Bridges*, 346 U.S. at 217-219; emphasis added).

Judge Wilkins criticized as "misplaced" the relator's "heavy reliance" on the Fourth Circuit's decision in this case. 2014 WL 2772907, at *20 n.27. He also found "unilluminating" (*ibid.*) *United States ex rel. McCans* v. *Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), aff'd per curiam, 254 F.2d 90 (D.C. Cir. 1958)—cited prominently by both relator and the Solicitor General here. See Opp. 7, 8, 9; Br. for United States as *Amicus Curiae* 15. Judge Wilkins observed—as petitioners have explained—that *McCans* addressed whether "the WSLA applied to a civil FCA case" only in dicta. *Landis*, 2014 WL 2772907, at *20 n.27. Relying on *Bridges*, Judge Wilkins construed the WSLA narrowly, and held that it did not encompass the FCA claims in that case.[2]

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[1] Only the relator in *Landis* invoked the WSLA; "the government did not make th[at] argument." 2014 WL 2772907, at *19 n.25.

[2] Applying D.C. Circuit precedent, Judge Wilkins also concluded that civil FCA actions "do not require proof of fraud as an 'essential element,'" and explained that the relator "ha[d] not

Landis supports petitioners' arguments about why the WSLA does not apply to civil cases. As petitioners have explained, the panel here departed from *Bridges*'s rule of "narrow[] constru[ction]," by improperly extending WSLA tolling to a civil *qui tam* suit. Pet. 10-15. Here, as in *Landis*, "the WSLA has not tolled the running of the FCA's [statute of limitations] and * * * the WSLA does not apply to suspend any [statute of limitations] in this case." 2014 WL 2772907, at *20. *Landis* deepens the conflict in the lower courts and underscores the urgent need for this Court's review, to ensure uniformity on this frequently recurring and important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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contended that proof of specific intent to defraud is required." *Landis*, 2014 WL 2772907, at *20.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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v.

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ON WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Wartime Suspension of Limitations Act, 18 U.S.C. 3287, applies to a civil fraud claim brought by a private relator under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*

2. Whether the FCA's "first-to-file" provision, 31 U.S.C. 3730(b)(5), bars a relator from filing a new *qui tam* suit when a *qui tam* action raising similar allegations has been filed, but subsequently dismissed on non-merits grounds, before the new suit is commenced.

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In the Supreme Court of the United States

No. 12-1497

KELLOGG BROWN & ROOT SERVICES, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, EX REL. BENJAMIN CARTER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents questions concerning the construction of the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, and the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. 3287. The FCA is the primary tool by which the federal government combats fraud in federal contracts and programs. The WSLA was enacted to improve the government's ability to recover for frauds against the United States during times of war. The United States therefore has a substantial interest in the proper interpretation of both statutes. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. a. The FCA, 31 U.S.C. 3729 *et seq.*, provides for the imposition of civil penalties and treble damages against any person who, *inter alia*, "knowingly presents, or causes to be presented, a false or fraudulent claim" to the government "for payment or approval." 31 U.S.C. 3729(a)(1)(A). The FCA authorizes both the government and private persons to sue for violations. See 31 U.S.C. 3730(a) and (b). Suit must be brought within six years of the date of the violation, or within three years of the date the material facts were known or should have been known to the responsible government official (so long as the suit is brought within ten years of the violation). 31 U.S.C. 3731(b).

When a private person (known as a relator) brings a lawsuit (known as a *qui tam* action), the government may intervene and proceed with the action, or it may decline to intervene and allow the relator to proceed. See 31 U.S.C. 3730(b)(1)-(4) and (c). "When a person brings" a *qui tam* action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). Section 3730(b)(5) is commonly known as the FCA's "first-to-file" provision.

b. The WSLA, 18 U.S.C. 3287, suspends the statute of limitations in certain cases while the government is engaged in military operations. As amended most recently in 2008, the WSLA provides in relevant part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, * * * the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

Ibid. Congress enacted the WSLA to ensure "that the limitations statute[s] will not operate, under stress of [wartime], for the protection of those who would defraud or attempt to defraud the United States." S. Rep. No. 1544, 77th Cong., 2d Sess. 2 (1942) (1942 Senate Report).

2. Petitioners provided logistical services to the United States military in connection with the armed conflict in Iraq. Pet. App. 3a. From January to April 2005, respondent worked for petitioners on water-purification projects at two camps in Iraq. *Ibid.* Respondent alleges that petitioners instructed him to submit time sheets for time he did not work, and that it was "routine practice" for petitioners to overbill the United States government on these projects. *Id.* at 3a-4a, 48a-49a.

In February 2006, respondent brought an FCA suit against petitioners, alleging that they had fraudulently billed the government for work in Iraq. Pet. App. 4a. The district court dismissed the complaint for failure to plead fraud with particularity, and respondent filed an amended complaint. *Ibid.* In March 2010, the parties were alerted to the pendency of an argua-

bly related suit, *United States ex rel. Thorpe* v. *Halliburton Co.*, No. 05-CV-08924 (C.D. Cal. filed Dec. 23, 2005), that had been filed before respondent's action and remained pending at that time. Pet. App. 4a-5a.

Petitioners moved to dismiss respondent's suit based on the FCA's first-to-file provision. Pet. App. 5a; J.A. 41. The district court concluded that respondent's suit was "related" to the "pending" *Thorpe* case, and it dismissed respondent's complaint without prejudice. J.A. 41-51. Respondent appealed, and in the meantime, *Thorpe* was dismissed. Pet. App. 5a.

Respondent then re-filed his FCA suit against petitioners. Pet. App. 5a. The district court again dismissed the complaint based on the first-to-file bar, this time because respondent's first suit was still pending on appeal when he filed the second suit. *Id.* at 5a-6a. Respondent then voluntarily dismissed that appeal. *Id.* at 5a.

In June 2011, respondent filed this action, again based on petitioners' alleged fraudulent billing for services in Iraq. Pet. App. 5a-6a. Petitioners again moved to dismiss the complaint under the first-to-file provision. That motion was based on the dismissed *Thorpe* action; on a pending suit filed in Maryland (*United States ex rel. Duprey* v. *Halliburton, Inc.*, No. 07-CV-01487 (D. Md. filed June 5, 2007)); and on a pending, under-seal case in Texas. Pet. App. 6a-7a, 52a. Petitioners also contended that most of respondent's claims are untimely under the FCA's six-year statute of limitations. *Id.* at 6a, 57a.

3. The district court dismissed the complaint with prejudice. Pet. App. 47a-76a. The court held that the first-to-file provision barred respondent's suit because *Duprey* was pending when respondent filed his June

2011 complaint. *Id.* at 58a-64a. While acknowledging that *Duprey* had subsequently been dismissed on procedural grounds, the court held that the first-to-file provision depends on "the facts as they existed when the action was brought." *Id.* at 63a-64a. The court did not consider whether *Thorpe* or the Texas case also would bar the suit. *Id.* at 58a & n.4; J.A. 571.

The district court also found most of respondent's claims time-barred, rejecting respondent's argument that the WSLA had suspended the running of the FCA's statute of limitations. Pet. App. 64a-75a. The court acknowledged that the term "offense" in the WSLA could refer to both criminal and civil violations of law, *id.* at 68a, 73a, and that many courts have interpreted the WSLA to apply to civil fraud violations, *id.* at 71a & n.17. The court concluded, however, that the WSLA does not apply to "a civil FCA action brought by a relator, in which the United States has opted not to intervene." *Id.* at 73a-74a.

4. The court of appeals reversed and remanded. Pet. App. 1a-23a.

a. The court of appeals held that the WSLA suspends the statute of limitations for respondent's claims. Pet. App. 8a-16a. The court explained that the statute's reference to "offense[s] * * * involving fraud" literally encompasses both criminal and civil violations, and it concluded that Congress intended the WSLA to apply to both. *Id.* at 13a-14a. The court explained that the WSLA had originally referred only to offenses "now indictable," thus limiting its reach to acts of fraud prosecuted as crimes, but that Congress had later deleted that language, evidencing its intent to apply the WSLA to civil fraud actions. *Id.* at 14a. The court also explained that

applying the WSLA to civil fraud offenses "furthers the WSLA's purpose" of "root[ing] out fraud against the United States during times of war." *Id.* at 16a. Finally, the court of appeals rejected petitioners' argument that the WSLA is limited to FCA suits in which the United States has chosen to participate as a party. The court explained that the WSLA's applicability "depends upon whether the country is at war," "not who brings the case." *Id.* at 15a; see *id.* at 15a-16a.

b. The court of appeals held that, because *Duprey* and the Texas action were both "pending" when respondent filed his June 2011 complaint, and those actions were sufficiently "related" to this lawsuit, respondent's complaint was properly dismissed under the first-to-file provision. Pet. App. 17a-20a. The court also held, however, that the dismissal on first-to-file grounds should have been without prejudice, since *Duprey* and the Texas action had each been dismissed during respondent's suit. *Id.* at 20a-22a. The court explained that, "once a case is no longer pending," "the first-to-file bar does not stop a relator from filing a related case," *id.* at 21a-22a, but that other doctrines, such as res judicata or the FCA's public-disclosure bar, could "prevent the filing of subsequent cases." *Id.* at 21a.

c. Judge Wynn concurred, providing additional reasons why the WSLA applies to respondent's suit. Pet. App. 23a-31a. Judge Agee concurred in part and dissented in part, taking the view that the WSLA suspends the statute of limitations only for civil actions where the United States is a party or has intervened. *Id.* at 31a-46a.

SUMMARY OF ARGUMENT

I. The WSLA suspends the statute of limitations during wartime for a civil fraud claim under the FCA.

A. The WSLA suspends the statute of limitations during times of war for "any offense * * * involving fraud or attempted fraud against the United States." 18 U.S.C. 3287. A civil violation of the FCA is such an "offense." Petitioners construe the word as synonymous with "crime," but the term "offense" is often used, including in numerous United States Code provisions and many decisions of this Court, to refer to civil violations of law.

Although the WSLA is located in Title 18, nothing in the operative text limits its application to crimes. The FCA's own limitations provisions likewise do not preclude the WSLA from applying. Finally, nothing in the WSLA limits its use to suits in which the government is a party, and it is uncontested that the requisite authorization to use military force is in effect.

B. The history of the WSLA's development confirms that the statute applies to civil fraud offenses. As originally enacted, the WSLA referred to offenses "now indictable under any existing statutes," thus limiting the statute's application to crimes. In 1944, Congress removed the "now indictable" language, evidencing its intention to apply the WSLA to both civil and criminal fraud cases. Congress made that change at the same time it enacted new civil penalties and enforcement procedures to address wartime fraud, further showing that Congress's focus was not limited to criminal prosecutions. Since 1944, Congress has not taken any action to limit the WSLA's reach to crimes.

C. Application of the WSLA to civil FCA actions is necessary to fully effectuate the purposes of both statutes. Congress recognized that wartime conditions may impede the detection and prosecution of fraud, and it enacted the WSLA to alleviate those burdens. Fraud during wartime threatens the public fisc, whether it is ultimately prosecuted civilly or criminally. The FCA is the primary means for the government to recover the money obtained through fraud against federal programs, including military programs. Indeed, the FCA's original purpose was to redress fraud during the Civil War.

II. The FCA's first-to-file provision does not bar a relator from bringing suit when a related suit has been both filed and dismissed before the relator's suit is commenced.

A. The first-to-file provision states that, when a private person brings an FCA suit, "no person other than the Government may intervene or bring a related action based on the facts underlying the *pending* action." 31 U.S.C. 3730(b)(5) (emphasis added). Because the word "pending" refers to a lawsuit that is awaiting decision, it does not accurately describe a lawsuit that has been dismissed. After an initial *qui tam* suit has been dismissed, subsequent *qui tam* suits based on the same facts may sometimes be precluded by the FCA's public-disclosure provision or by res judicata principles. The FCA's first-to-file bar, however, does not apply in this circumstance.

B. Limiting the first-to-file bar to the situation where the first case remains "pending" makes sense. The provision ensures that the relator who brought the first suit does not have his recovery diluted by intervenors or follow-on suits, and that defendants do

not face two or more simultaneous suits based on the same allegations. Once the first suit has been dismissed, the first relator no longer has a potential recovery to protect, and any legitimate interest the defendant has in avoiding future litigation is addressed through res judicata principles.

When it amended the FCA in 1986, Congress took a variety of steps to encourage meritorious private actions while barring certain parasitic suits. The first-to-file bar primarily protects the relator's interest in recovery, while the public-disclosure provision stops parasitic suits based on public information. Petitioners' view disrupts the harmony between those two provisions, treating the first-to-file bar as a draconian version of the public-disclosure bar, forever barring an FCA suit based on the same facts (even one brought by an original source) once the first suit has been dismissed. Petitioners' interpretation would likewise subvert the established rule that non-merits dismissals do not have res judicata effect.

ARGUMENT

I. THE WARTIME SUSPENSION OF LIMITATIONS ACT APPLIES TO A CIVIL FRAUD CLAIM UNDER THE FALSE CLAIMS ACT

A. The Plain Text Of The WSLA Encompasses Civil FCA Violations

1. The WSLA provides that, when the United States is at war or Congress has authorized the use of military force, "the running of any statute of limitations applicable to any offense * * * involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until 5

years after" the termination of hostilities. 18 U.S.C. 3287(1). The WSLA also tolls the statutes of limitations for other specified "offenses" involving government property and contracts. 18 U.S.C. 3287(2) and (3).

By its plain terms, the WSLA applies here because petitioners' alleged FCA violation is an "offense" that "involve[s] fraud or attempted fraud against the United States." As both courts below correctly recognized, the word "offense" can encompass both civil and criminal violations. See Pet. App. 13a-14a, 68a. "Offense" might mean "a crime," or it might refer more broadly to "[a] violation of the law." *Black's Law Dictionary* 1186 (9th ed. 2009); see, *e.g.*, 1 John Austin, *Lectures on Jurisprudence: The Philosophy of Positive Law* 196 (Robert Campbell ed., student ed. 1875) ("[a]n offence" may be either a "Civil Injury" or a "Crime"); 10 *The Oxford English Dictionary* 724 (2d ed. 1989) ("offence" is "[a] breach of law, duty, propriety, or etiquette"); *Webster's Third New International Dictionary* 1566 (1993) ("offense" is "an infraction of law" or "crime"). The dictionary definitions petitioners cite are in accord; one notes that "offense" can mean "[a] transgression of law," *American Heritage Dictionary* 1255 (3d ed. 1992), and another states that an "offense" may include a violation of criminal law with a civil remedy, see *Black's Law Dictionary* 1232 (4th ed. 1951).

Numerous provisions of the United States Code use the term "offense" to refer to civil violations of law. See, *e.g.*, 7 U.S.C. 136*l* (pesticide-control law); 12 U.S.C. 1723i (mortgage laws); 15 U.S.C. 45(*l*) (Federal Trade Commission order); 16 U.S.C. 1540(a)(1) (Endangered Species Act); 29 U.S.C. 2619(b) (Family and

Medical Leave Act). This Court likewise has used the term "offense" to describe civil violations of law. See, *e.g.*, *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009) (referring to "Title VII offenses"); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007) (addressing whether conduct in civil antitrust action established a "Sherman Act offense" (citation and internal quotation marks omitted)); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996) ("exemplary damages imposed on a defendant should reflect the enormity of his offense" (citation omitted)); *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 93 (1992) (hazardous-waste licensing laws imposed "escalating fines for each offense").

In *United States* v. *Hutto*, 256 U.S. 524 (1921), the Court held that the federal conspiracy statute, which prohibited conspiracy "to commit any offense against the United States," encompassed a conspiracy to violate a civil statute that prohibited federal Indian affairs employees from trading with Indians. *Id.* at 525, 528-529 (quoting § 37, Criminal Code). The Court explained that, by using the phrase "offense against the United States," the conspiracy statute "does not in terms require that the contemplated offense shall of itself be a criminal offense," but can include any conspiracy "to accomplish a purpose either criminal or otherwise unlawful." *Id.* at 528-529. That holding provides further evidence that the word "offense" is not limited to crimes but instead may be broader, depending on the context.[1]

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[1] The current federal conspiracy statute (18 U.S.C. 371) establishes a five-year maximum term of imprisonment for conspiring to commit an "offense against the United States" or to "defraud the

Congress defined the WSLA's coverage not by reference to the criminal or civil character of the underlying violation, but by reference to the substantive nature of the wrongdoing involved. The WSLA applies to a range of conduct—offenses involving fraud against the United States, government property, and government contracts—that threatens the public fisc during times of war. The statute broadly applies to "any" such offenses and to fraud perpetrated "in any manner." See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("any" is a term of "breadth"). Although Congress could have limited the WSLA to "crimes," it has not done so, instead using the term "offense" to reach a broader class of unlawful conduct directed at government funds, property, or contracts.[2]

2. Petitioners contend (Br. 20-21) that the WSLA must be limited to crimes because it is codified in Title 18 of the United States Code. But numerous provi-

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United States." Section 371 then states that, if the "offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment * * * shall not exceed the maximum punishment provided for such misdemeanor." *Ibid.* Congress's use of the term "misdemeanor" to describe less serious "offense[s]" suggests that the word "offense" in the first clause of Section 371 means "crime." But see *United States* v. *Wiesner*, 216 F.2d 739, 741-742 (2d Cir. 1954). Assuming that inference is correct, however, it simply shows that the term "offense" sometimes encompasses civil violations and sometimes does not, depending on the statutory context in which the word appears. The Court's decision in *Hutto* squarely refutes any suggestion that "offense" *always* means "crime," even with respect to statutes that appear in the Criminal Code.

[2] A wartime tolling provision also appears in the Uniform Code of Military Justice, but that provision is narrower than the WSLA because it applies to "any offense *under this chapter* * * * involving fraud." 10 U.S.C. 843(f) (emphasis added).

sions in Title 18 use the word "offense" to refer to conduct with both civil and criminal penalties.[3] And when Congress reorganized Title 18 in 1948, it did not change the relevant WSLA language, which refers to an "offense" involving fraud against the government. See pp. 20-21, *infra*. The Court therefore should be reluctant to "place too much significance on the location of a statute in the United States Code." *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376 (2004).

Petitioners argue (Br. 35-36) that the WSLA should not apply to FCA claims because the FCA contains its own statute of limitations, which includes a tolling provision. The whole point of the WSLA, however, is to affect the manner in which existing (often offense-specific) limitations provisions operate. The WSLA applies, moreover, even in circumstances where other tolling provisions may be applicable. Assuming the requisite wartime conditions were present, the WSLA would clearly toll the five-year statute of limitations applicable to criminal false-claims offenses, see 18 U.S.C. 286, 287, 3282(a), even though in a particular case the limitations period could be tolled on another ground as well, see, *e.g.*, 18 U.S.C. 3290 (tolling for prosecution of fugitive from justice); 18 U.S.C. 3292 (tolling to obtain foreign evidence). Nothing in the WSLA suggests that it cannot similarly coexist with the limitations provisions in the FCA.

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[3] See, *e.g.*, 18 U.S.C. 38 (aircraft-parts fraud); 18 U.S.C. 216 (bribery and conflict-of-interest offenses); 18 U.S.C. 248 (interference with access to reproductive health services); 18 U.S.C. 670 (medical-product theft); 18 U.S.C. 1033(a) (insurance fraud); 18 U.S.C. 1964 (civil RICO); 18 U.S.C. 2292(a) (maritime offenses); 18 U.S.C. 2339B, 2339C (terrorism offenses).

3. Under 31 U.S.C. 3731(b), a civil FCA suit may not be commenced "more than 6 years after the" violation is committed, or "more than 3 years after the date when" the responsible federal official knew or should have known the relevant facts, "but in no event more than 10 years after the date on which the violation is committed, whichever occurs last." Petitioners contend that the court of appeals' "extension of WSLA tolling to *qui tam* claims is * * * irreconcilable with the FCA's express limitations provisions." Pet. Br. 35. That claim is misconceived.

Petitioners' claim of conflict between the WSLA and the FCA is premised on the FCA's *ten*-year limit, which petitioners view as a "statute of repose." Pet. Br. 35-36. Respondent filed his current suit less than ten years after the alleged violations, however, so the timeliness of that suit does not depend on whether the WSLA can suspend the ten-year limit.

In *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), this Court discussed the differences between "statutes of limitations" and "statutes of repose"; explained that the term "statute of limitations" sometimes encompasses statutes of repose and sometimes does not, depending on the context in which that term appears; and held that the phrase "applicable limitations period" in 42 U.S.C. 9658 does not include state statutes of repose. See 134 S. Ct. at 2182-2187. In a future case where the issue is presented, the Court could decide the distinct questions potentially implicated by use of the WSLA to suspend the FCA's ten-year limit. The Court's decision in *Waldburger* establishes the framework for addressing those questions. But the distinct legal status of "statutes of repose" provides no basis for questioning the WSLA's applicability to

the FCA's *six*-year limit, which is indisputably a (tollable) statute of limitations, much less for concluding that the WSLA is categorically inapplicable to civil cases.

4. Petitioners state (Br. 37, 38) that it would be "particularly inconsistent with Congress's scheme" to apply the WSLA in *qui tam* suits because private relators do not "experience the same resource constraints during wartime as government prosecutors and investigators." But private relators, like government officials, may find it difficult during times of war to gain access to necessary evidence. More fundamentally, nothing in the WSLA's text distinguishes between FCA suits filed (or intervened in) by the government and those commenced and prosecuted by *qui tam* relators. By its terms, the WSLA's applicability turns on the nature of the "offense" alleged, not on the identity of the plaintiff. See Pet. App. 15a-16a. The "offense" alleged in this case clearly is one "involving fraud or attempted fraud against the United States or any agency thereof." 18 U.S.C. 3287(1).

5. Petitioners contend (Br. 38-41) that the phrase "at war" in the pre-2008 version of the WSLA required a formally declared war. This case provides no occasion to address that question, because the timeliness of respondent's suit does not depend on whether the prior version of the WSLA required a formal declaration of war. Because respondent alleges FCA violations occurring in 2005, see Pet. App. 3a, the FCA's six-year limitations period had not expired when the WSLA was amended in 2008. At least from 2008 forward, the amended version of the statute (which applies "[w]hen the United States is at war or Congress has enacted a specific authorization for the

use of the Armed Forces," 18 U.S.C. 3287) prevented that limitations period from continuing to run. Respondent's suit is therefore timely, whether or not the prior version of the WSLA required a formal declaration of war. See Pet. 17-18 n.4 (petitioners' statement that "this Court * * * need not address the applicability of the 2008 amendment").

B. The History Of The WSLA's Development Confirms That The Statute Applies To Civil Frauds

1. As originally enacted in 1942, the WSLA provided that "the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate." Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747, 747-748.[4] Two years later, Congress amended the WSLA as part of the Contract Settlement Act of 1944, Pub. L. No. 78-395, § 19, 58 Stat. 649, 667. *Inter alia*, Congress broadened the "offense[s]" to which the WSLA applied by removing the limiting phrase "now indictable under any existing statutes." ch. 555, 56 Stat. 748.

The amended version of the WSLA suspended the statute of limitations for "any offense against the laws of the United States * * * involving defrauding or attempts to defraud the United States or any agency

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[4] Congress enacted a similar provision following World War I, see Act of Nov. 17, 1921, Pub. L. No. 67-92, ch. 124, 42 Stat. 220, and repealed that provision in 1927, see Act of Dec. 27, 1927, Pub. L. No. 70-3, ch. 6, 45 Stat. 51.

thereof whether by conspiracy or not, and in any manner." § 19(b), 58 Stat. 667.[5] The "now indictable" language in the original 1942 enactment had limited the WSLA's application to criminal fraud offenses (because only criminal offenses are "indictable"), and the subsequent deletion of that language made the statute "applicable to all actions involving fraud against the United States." Pet. App. 14a; accord, *e.g.*, *Dugan & McNamara, Inc.* v. *United States*, 127 F. Supp. 801, 802 (Ct. Cl. 1955) (reviewing that history and reaching the same conclusion). If Congress had intended for the WSLA to continue to apply only to crimes, it could have included some "limiting language" to make that point clear. Pet. App. 14a.

Congress's removal of the "now indictable" requirement is especially telling because the Contract Settlement Act was largely civil in nature. The Act's purpose was to ensure that government war contracts could be terminated, and creditors could be paid, more quickly, in order to allow for a speedy transition to a peacetime economy. See § 1, 58 Stat. 649. Recognizing that such an expedited process would increase the opportunity for fraud, Congress stated its intent to make available "all practicable methods * * * to prevent improper payments and to detect and prosecute fraud." § 1(f), 58 Stat. 649. Those new methods included both criminal and civil provisions. See § 19(c), 58 Stat. 667-668 (creating new criminal and civil offenses, including fine of $2000 per act and

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[5] Under the amended version, the limitations period was suspended for qualifying offenses "until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress." § 19(b), 58 Stat. 667.

double damages, for presenting false claims for payment in connection with war contracts). The Contract Settlement Act also established mechanisms to alert the Justice Department to war-contract settlements believed to be induced by fraud so that the Department could "take such action as it deems appropriate" to "recover payments made to such war contractor." §§ 16, 18(e), 58 Stat. 664-665, 666-667. The extension of the WSLA to civil offenses fits comfortably among those civil enforcement measures.

Congress's expansion of the WSLA to cover offenses related to wartime contracts and government property reinforces the inference that Congress intended the statute's tolling rule to reach civil fraud, contracting, and procurement offenses. In the same statute that removed the "now indictable" language, Congress added language to reach "any" offense "committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement" of any contract connected to the war effort. Contract Settlement Act § 19(b), 58 Stat. 667. Later in 1944, Congress again expanded the WSLA's reach to encompass "any" offense "committed in connection with the care and handling and disposal of property under the Surplus Property Act." Surplus Property Act of 1944, Pub. L. No. 78-457, § 28, 58 Stat. 765, 781. Those additions were consistent with Congress's goal of using "all practicable methods" (Contract Settlement Act, § 1(f), 58 Stat. 649) to stop those who attempt to defraud the government during wartime.

2. Petitioners contend (Br. 29-31) that the purpose of the original "now indictable" language was to "ensure[] that the WSLA would not revive criminal

charges whose statutes of limitations had lapsed," and that Congress removed those words in 1944 because other language in the WSLA served that purpose. But the language petitioners identify—which provides that the WSLA "shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law," § 19(b), 58 Stat. 667—was present in the 1942 WSLA. See ch. 555, 56 Stat. 748. Petitioners' view therefore fails to give practical significance to the deletion of the "now indictable" language.

Petitioners alternatively suggest (Br. 31 n.12) that "now indictable" was included to clarify that the WSLA applies to offenses already committed, and that this language became unnecessary by 1944 because of the "established practice of applying the WSLA to already-committed crimes." But both before and after the 1944 amendments, the statute contained language applying it to already-committed crimes. Compare ch. 555, 56 Stat. 748 (WSLA "shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run"), with § 19(b), 58 Stat. 667 (same). Petitioners thus identify no sound alternative explanation for Congress's initial inclusion, and subsequent deletion, of the phrase "now indictable under any existing statutes."

During the 15 years after the Contract Settlement Act was enacted, both courts of appeals that addressed the issue construed the WSLA to extend to civil cases. See *United States* v. *Hougham*, 270 F.2d 290, 292 & n.3 (9th Cir. 1959), rev'd on other grounds, 364 U.S. 310 (1960); *United States* v. *Witherspoon*, 211 F.2d 858, 860-863 (6th Cir. 1954). The former Court of Claims reached the same conclusion, see *Dugan & McNamara*, 127 F. Supp. at 802-804, as did numerous

district courts, see Resp. Br. 22-23 n.7, with only one court adopting a contrary view, see *United States* v. *Weaver*, 107 F. Supp. 963, 966 (N.D. Ala. 1952), rev'd on other grounds, 207 F.2d 796 (5th Cir. 1953). In 1959, the United States stated in a brief to this Court that the WSLA applies only to crimes. See U.S. Br. at 26-28, *Koller* v. *United States*, 359 U.S. 309 (1959) (No. 362).[6] The WSLA was not at issue in *Koller*, however, and the government's brief did not discuss either the sequence of enactments (including the deletion of the "now indictable" language) that had produced the WSLA in its then-current form or the lower-court decisions finding the statute applicable to civil cases. The Court's summary disposition in *Koller* did not address the proper construction of the WSLA.

3. Congress has not taken any action since 1944 to limit the WSLA's reach to crimes. In 1948, Congress modified the statute "to make it permanent instead of temporary legislation," thereby "obviat[ing] the necessity of reenacting such legislation" for each future war. H.R. Rep. No. 304, 80th Cong., 1st Sess. A165 (1947). Congress accomplished that objective by deleting language that suspended the statute of limitations "until three years after the termination of hostilities in the *present* war," § 19(b), 58 Stat. 667 (emphasis added), and providing instead that, "[w]hen the United States is at war," the statute of limitations for the specified offenses "shall be suspended until three years after the termination of hostilities," Act of June 25, 1948, Pub. L. No. 80-772, § 3287, 62 Stat. 683, 828. Congress also recodified the WSLA in 1948, when it

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[6] Although government counsel's discussion of that point at oral argument was more equivocal (see Resp. Br. 32 n.9), counsel did not withdraw the statement made in the government's brief.

revised Title 18 and enacted it into positive law. See 62 Stat. 683. The 1948 amendments made no material change, however, to the list of offenses that the WSLA covered. Before and after 1948, the WSLA applied to "offense[s]" "involving fraud or attempted fraud against the United States." Compare § 19(b), 58 Stat. 667, with § 3287, 62 Stat. 828.

The WSLA remained unchanged until 2008. Congress then amended the law to provide for suspension of limitations periods not only when the United States is "at war," but also when "Congress has enacted a specific authorization for the use of the Armed Forces," and to expand the suspension period from three years to five years after the termination of hostilities. Department of Defense Appropriations Act, 2009, Pub. L. No. 110-329, Div. C, Tit. VIII, § 8117, 122 Stat. 3574, 3647. Again, however, Congress did nothing to limit the offenses reached by the statute to crimes.

Petitioners contend (Br. 27) that the legislative history of the 2008 amendment evidences a clear intention that the WSLA applies only to crimes. But statements in the 2008 legislative history point in both directions, some supporting the view that the WSLA applies only to criminal prosecutions, and others the view that it encompasses civil enforcement suits. For example, the Senate Report refers to "prosecutors * * * pursu[ing] contracting fraud" through criminal cases, S. Rep. No. 431, 110th Cong., 2d Sess. 2 (2008) (2008 Senate Report), and notes the consistency of the suspension period with the "general statute for limitations of criminal offenses," *id.* at 4. The same report also refers, however, to Congress's broader goal of "promot[ing] the prosecution *and* enforce-

ment" of wartime fraud, *id.* at 1 (emphasis added), and ensuring that "investigators and auditors" have adequate time to bring "those who have defrauded the American taxpayers to justice" through "litigation," see *id.* at 4, 5. See also, *e.g.*, *id.* at 5 ("courts, prosecutors, and litigants" need to "be sure when the statute of limitations starts to run"); *id.* at 6 (WSLA enables the government to "recover taxpayers' money" from companies that "delivered defective products, overbilled the government, or committed criminal fraud"). In any event, the history of the 2008 legislation, which amended the WSLA in other respects but did not alter the class of "offense[s]" to which the statute applies, would be a "hazardous" basis for discerning the intent of the 1944 Congress on the question presented here. *United States* v. *Price*, 361 U.S. 304, 313 (1960).

C. Applying The WSLA To Civil FCA Violations Furthers The Statute's Purposes

1. The WSLA reflects Congress's recognition that during wartime, there are numerous "opportunities * * * for unscrupulous persons to defraud the Government," and those frauds "may be difficult to discover" and "may not come to light for some time to come." 1942 Senate Report 2. Even when wartime fraud and related contract and property offenses have been identified, government enforcement efforts will "require considerable time before they advance to the stage of litigation." S. Rep. No. 1057, 78th Cong., 2d Sess. 14 (1944) (1944 Senate Report). Suspension of the limitations period ensures "that frauds may be discovered and punished even after the termination of the present conflict," and that the statute of limitations will not "protect[] * * * those who would defraud or attempt to defraud the United States."

1942 Senate Report 2; see H.R. Rep. No. 2051, 77th Cong., 2d Sess. 2 (1942) (same). Those rationales for suspending the limitations period in wartime fraud cases apply equally in the criminal and civil contexts. Congress's focus in enacting and amending the WSLA was to stop wartime misconduct that threatened the public fisc, see, *e.g.*, *Bridges* v. *United States*, 346 U.S. 209, 218 (1953), and suspending the limitations period for both civil and criminal fraud suits serves that important goal.

2. The government suffers substantial losses due to fraud, including "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation." *United States* v. *Halper*, 490 U.S. 435, 445 (1989). The FCA's civil enforcement mechanisms, which provide for treble damages as well as civil penalties, are "the Government's primary litigative tool for combatting fraud." S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986) (1986 Senate Report); see *United States ex rel. Marcy* v. *Rowan Cos.*, 520 F.3d 384, 388 (5th Cir. 2008). Indeed, the FCA's original purpose was to root out wartime fraud, and the statute as first enacted "provided for both civil and criminal penalties" to further that goal. 1986 Senate Report 8; see *Rainwater* v. *United States*, 356 U.S. 590, 592 (1958) (explaining that the FCA was enacted during the Civil War to "protect the funds and property of the Government from fraudulent claims").

Criminal and civil enforcement proceedings are both essential tools to address wartime frauds. As of 2008, investigations and audits "ha[d] uncovered how billions in taxpayers' money ha[d] been lost to contract fraud, waste, and abuse" in the "wars in Iraq and Afghanistan." 2008 Senate Report 2. "[H]undreds of

investigations" into alleged wartime fraud "remain[ed] pending," and "new investigations" were "started every month." *Ibid.* Applying the WSLA to both criminal and civil fraud offenses ensures that the government has the necessary time to investigate and bring suit to remedy those frauds, and that private *qui tam* relators may assist the government in that effort.

3. Petitioners do not dispute that application of the WSLA to civil fraud offenses would further the government's interest in addressing wartime fraud. Instead, they argue (Br. 35-38, 42-43) that application of the WSLA to civil FCA actions would result in "indefinite" tolling of the statute of limitations for those offenses. But all agree that Congress intended the WSLA to suspend the limitations period for criminal fraud cases. Further, tolling under the statute has an endpoint—"5 years after the termination of hostilities." 18 U.S.C. 3287.[7] To the extent that petitioners view that suspension period as unduly protracted, their quarrel is with Congress's balancing of interests in the specific context of wartime fraud. Cf. Pet. App. 29a (Wynn, J., concurring). And, as we explain above, this case does not present the question whether the WSLA suspends the operation of the FCA's ten-year limit on the commencement of suit. See pp. 14-15, *supra*.

Even apart from the statute of limitations, moreover, both the government and relators have ample incentives to investigate and sue to address wartime frauds as promptly as possible. The government has an interest in promptly restoring fraudulently-

[7] No issue about the interpretation of that phrase is before the Court.

obtained funds to the Treasury, and in ensuring that those who swindled the government are brought to justice. As time passes, "memories may dim, witnesses depart, and evidence disappear." *Hardin* v. *Straub*, 490 U.S. 536, 543 n.12 (1989). Private relators share those evidentiary incentives to bring suit promptly, and they also face FCA-specific hurdles if they delay in bringing suit. As discussed below, the first-to-file provision bars a suit based on the same facts as a "pending" suit, 31 U.S.C. 3730(b)(5), and the public-disclosure provision generally precludes suit once the factual circumstances of fraud become publicly known, see 31 U.S.C. 3730(e)(4). A potential relator who delays in filing suit thus runs a serious risk that another private party (or the government) will be the first to file, or that the public disclosure of pertinent information will bar his action. See Pet. App. 30a (Wynn, J., concurring) (explaining that relators "have an incentive to bring actions as early as possible"). Construing the WSLA in accordance with its text and history therefore creates no significant risk of gratuitous delay in the commencement of civil FCA suits.

II. THE FCA'S FIRST-TO-FILE PROVISION BARS A *QUI TAM* ACTION ONLY WHEN A RELATED SUIT REMAINS UNDECIDED

A. A Suit That Has Been Finally Dismissed Is No Longer "Pending"

1. The FCA's first-to-file provision states: "When a person brings an action under this subsection [*i.e.*, the subsection authorizing *qui tam* suits], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. 3730(b)(5). The question in this

case is whether Section 3730(b)(5) precludes a *qui tam* suit when a "related" *qui tam* suit was previously filed but has been dismissed by the time the second action is commenced. The court of appeals correctly held that, in this situation, Section 3730(b)(5) does not apply because the first suit is no longer "pending."

As used in the context of litigation, the word "pending" has a well-established meaning. A case is "pending" if it "[r]emain[s] undecided," is "awaiting decision," or is "under consideration." *Black's Law Dictionary* 1248 (9th ed. 2009); see, *e.g.*, *Webster's Third New International Dictionary* 1669 (1993) (defining "pending" as "not yet decided," "in continuance," or "in suspense"); Bryan A. Garner, *Garner's Modern American Usage* 596 (2003) (a case is "pending" when it "is awaiting an outcome"). This Court has used that "ordinary meaning," explaining that "pending" means "in continuance" or "not yet decided." *Carey* v. *Saffold*, 536 U.S. 214, 219-220 (2002) (relying on *Webster's*). A civil action therefore ceases to be "pending" when it has been dismissed and there is no issue left for the court to decide.

Accordingly, if a relator files a *qui tam* suit, and there is a "pending" lawsuit with sufficiently related claims, then the second suit is barred by operation of the first-to-file provision. But if the relator files a *qui tam* suit after a related first-filed suit has been dismissed, the first-to-file provision is inapplicable because the first suit is no longer "pending." All but one of the courts of appeals that have considered the issue have construed Section 3730(b)(5) in that manner. See Pet. App. 22a; *United States ex rel. Chovanec* v. *Apria Healthcare Grp., Inc.*, 606 F.3d 361, 365 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.*,

566 F.3d 956, 963-964 (10th Cir. 2009) (dicta); but see *United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014), petition for cert. pending, No. 14-238 (filed Aug. 26, 2014).

2. Petitioners assert (Pet. Br. 44-45) that the word "pending" is merely "referential," in that it identifies the first-filed action. But if Congress had intended the initial *qui tam* suit to bar all subsequent *qui tam* actions based on the same facts, regardless of when or on what ground the first suit was disposed of, it could easily have accomplished that objective. Congress could have provided, for example, that when a *qui tam* suit has been filed, "no person other than the Government may * * * bring a related action based on the facts underlying" the "first" action or the "original" action.

Indeed, even if the word "pending" were simply omitted, so that Section 3730(b)(5) barred any relator from "bring[ing] a related action based on the facts underlying the action," there would be "no great mystery about which action bars the other." *Shea*, 748 F.3d at 347 (Srinivasan, J., concurring in part and dissenting in part (internal quotation marks omitted)). Congress chose instead to refer to "the pending action," a term that accurately describes the initial *qui tam* suit only for so long as that suit remains active. Petitioners' interpretation of Section 3730(b)(5), under which a new *qui tam* suit can be barred by a prior action that was dismissed before the new suit was filed, would render the word "pending" superfluous.[8]

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[8] The government made the same mistake in its brief in *Chovanec*, which stated without explicit qualification that "a first-in-time *qui tam* complaint in which the Government declines intervention and which is subsequently dismissed prevents a second-in-

3. Other contextual evidence reinforces the conclusion that the word "pending" in Section 3730(b)(5) should be given its usual meaning. Once a *qui tam* suit has been filed, Section 3730(b)(5) bars any relator not only from "bring[ing] a related action based on the facts underlying the pending action," but also from "interven[ing]." 31 U.S.C. 3730(b)(5). The prohibition on (non-government) intervention makes sense only if and for so long as the original *qui tam* suit remains active; a person cannot intervene in a case that has been dismissed. See *Shea*, 748 F.3d at 348 (Srinivasan, J., concurring in part and dissenting in part). The accompanying prohibition on "bring[ing] a related action" should likewise be construed, in accordance with the usual meaning of the term "pending," to reflect the same premise.

A different FCA provision states that a petition challenging certain discovery demands may be filed in the district where "the proceeding in which such discovery was obtained is *or was last* pending." See 31 U.S.C. 3733(j)(2)(A) and (3)(A) (emphasis added). Congress's use of the italicized language reflects its evident awareness that a terminated judicial proceeding is no longer "pending." Congress should be presumed to have acted with the same awareness when it drafted Section 3730(b)(5).

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time complaint from proceeding." U.S. Br. at 26-27, *Chovanec*, *supra* (No. 06-1619), 2006 WL 3223990 (Sept. 11, 2006). The earlier complaints in *Chovanec*, however, had not yet been dismissed (and therefore were still "pending") when Chovanec filed her own complaint. See *id.* at 20 n.5.

B. Limiting The First-To-File Bar To "Pending" Actions Furthers The Statute's Purposes Of Redressing Misconduct While Discouraging Parasitic Claims

1. The key purpose of the first-to-file provision is to "encourag[e] whistleblowers to come forward by rewarding the first to do so." *Campbell* v. *Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005); see 1986 Senate Report 2 (Congress amended FCA to "encourage any individual knowing of Government fraud to bring that information forward"). The first-to-file bar furthers that purpose by protecting the first relator from either a race to judgment or dilution of any recovery his suit might produce. See, *e.g.*, *Natural Gas Royalties*, 566 F.3d at 963 ("[The] true value [of the first-to-file bar] lies in protecting the recovery of the first relator who files."). If multiple suits were permitted and the entire recovery went to the relator who first obtained a favorable judgment, the disbursement of that recovery would depend on the vagaries of litigation timing, and the relator who filed suit initially might receive no reward for his efforts. Alternatively, if "dozens of relators could expect to share a recovery for the same conduct," the prospect of a fragmented award would "decreas[e] the[] incentive to bring a *qui tam* action in the first place." *United States ex rel. LaCorte* v. *SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998). The first-to-file bar also protects an FCA defendant from facing simultaneous *qui tam* actions regarding the same alleged misconduct. See Pet. App. 18a (noting agreement among the circuits on the standards used to determine whether two *qui tam* suits are "related" within the meaning of Section 3730(b)(5)).

Neither of those rationales applies, however, after the first-filed action has been dismissed. Once the initial suit has been dismissed, the first relator has no continuing interest in avoiding dilution of his (now hypothetical) recovery. See *Shea*, 748 F.3d at 348-349 (internal quotation marks and citation omitted). The defendant likewise no longer faces the prospect of simultaneous suits. If the first-filed action has been decided *on the merits*, "the doctrine of claim preclusion may prevent the filing of subsequent cases." Pet. App. 21a; see, *e.g.*, *Chovanec*, 606 F.3d at 362; cf. *United States ex rel. Eisenstein* v. *City of N.Y.*, 556 U.S. 928, 936 (2009) (noting that "the United States is bound by the judgment in all FCA actions regardless of its participation in the case"). But if the first-filed action was dismissed on *non-merits* grounds, the defendant cannot expect to avoid litigating the merits of an FCA claim brought by a relator who otherwise satisfies the statute's requirements.

2. Application of the first-to-file bar only when there is a "pending" suit furthers the overall purposes of the 1986 FCA amendments. Congress enacted the first-to-file bar as part of a comprehensive effort to modernize the FCA. See 1986 Senate Report 1-2. That effort was premised on a recognition that *qui tam* suits are an essential supplement to government actions. See *id.* at 2, 4, 7, 8. Because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity," Congress provided financial incentives and protection against retaliation for private persons who bring FCA suits. *Id.* at 4. The first-to-file bar protects the financial incentives for relators by "clarif[ying] that only the

Government may intervene in a *qui tam* action" and preventing "class actions or multiple separate suits." *Id.* at 25.

The first-to-file provision works in tandem with the public-disclosure bar, which also was enacted in 1986. The public-disclosure bar prevents parasitic lawsuits by requiring that an FCA claim be dismissed if the allegations or transactions underlying the claim have been publicly disclosed in various fora, unless the person bringing suit qualifies as an "original source." 31 U.S.C. 3730(e)(4). The bar applies not only if information is disclosed through litigation, but also if it comes to light through federal hearings, reports, or investigations, or through the news media. *Ibid.* By preventing suits based on public information while allowing an original source to bring suit, Congress sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Maxwell* v. *Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1184 (10th Cir. 2008) (citation omitted).

Acceptance of petitioners' expansive view of the first-to-file bar would disrupt that balance. The public-disclosure bar does not categorically preclude *qui tam* suits that are premised on publicly available information. Rather, it allows such suits to be filed by an "original source," thereby alleviating a possible disincentive to the provision of fraud-related information to the government. See *Shea*, 748 F.3d at 350 (Srinivasan, J., concurring in part and dissenting in part). Petitioners' reading of Section 3730(b)(5) would transform that provision into a "more draconian public

disclosure bar," *Natural Gas Royalties*, 566 F.3d at 964, where "an action that Congress specifically sought to allow under the original-source exception would nonetheless be disallowed under the first-to-file bar," *Shea*, 748 F.3d at 350 (Srinivasan, J., concurring in part and dissenting in part).

Under petitioners' interpretation, the initial *qui tam* suit would bar all further *qui tam* actions based on the same facts, even if the first suit has been dismissed as procedurally defective or on other grounds wholly unrelated to the merits. *Inter alia*, petitioners' rule would apply if the first suit is dismissed on public-disclosure grounds even if the second relator qualifies as an "original source." Such a rule is contrary to Congress's stated goal of "encourag[ing] private individuals who are aware of fraud being perpetrated against the Government to bring such information forward." H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) (1986 House Report). That the government could bring suit itself after a first *qui tam* suit was dismissed (Pet. Br. 51-52) is no answer, because the government's limited resources, combined with its lack of inside knowledge, make *qui tam* suits both necessary and important. See 1986 Senate Report 2 ("[O]nly a coordinated effort of both the Government and the citizenry" will be effective in addressing fraud against the government.).

3. The first-to-file provision works together with res judicata principles to form a seamless whole. While a first action is "pending," the first-to-file bar prevents the defendant from being forced to litigate the merits in two courts simultaneously. Once the first suit has gone to judgment, the defendant's legitimate interests in avoiding relitigation of previously

decided issues are protected by the same res judicata principles that protect those interests in other legal contexts. Application of those principles generally turns on whether the initial judgment reflects a decision on the merits. See 1 Restatement (Second) of Judgments § 19 & cmt. a, at 161-162 (1982); 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4435, at 132-149 (2d ed. 2002); see also, *e.g.*, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326-327 & n.5 (1979).

Like other lawsuits, a *qui tam* action may be dismissed at the threshold for any number of reasons, such as improper service, improper venue, lack of personal jurisdiction, or failure to plead fraud with particularity. A *qui tam* relator might also choose, for a variety of reasons, to voluntarily dismiss his complaint. Suits dismissed on such threshold grounds will not have been evaluated on the merits. Yet if the filing of the first action permanently barred any future private action, the defendant would be insulated from further *qui tam* suits even in cases where it had acted unlawfully. Petitioners' interpretation would thus give Section 3730(b)(5) the practical effect of a "more draconian" res judicata rule, cf. *Natural Gas Royalties*, 566 F.3d at 964, since (in petitioners' view) even a non-merits judgment in the initial *qui tam* suit would preclude subsequent suits based on the same facts.

If Section 3730(b)(5) were a defendant's *only* potential source of protection against sequential *qui tam* suits based on the same allegations, petitioners' policy arguments would have some force. But merits judgments in *qui tam* suits can have preclusive effects on non-parties, including the government, see, *e.g.*, p. 30,

supra; *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (setting out settled issue- and claim-preclusion rules), and merits determinations in alternative proceedings brought by the government also have preclusive effect, see 31 U.S.C. 3730(c)(5) (giving preclusive effect to "[a]ny finding of fact or conclusion of law made in such other proceeding"); see also 1986 House Report 24. The rule that non-merits judgments lack res judicata effect is not an obstacle to be overcome, but is instead central to the balance between competing interests that preclusion rules have traditionally struck. Nothing in the text or history of Section 3730(b)(5) suggests that Congress sought to expand the circumstances in which future litigants can be precluded.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. As originally enacted in 1942, the Wartime Suspension of Limitations Act, Act of Aug. 24, 1942, Pub. L. No. 77-706, ch. 555, 56 Stat. 747-748, provided:

> [T]he running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

2. As amended by the Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat. 667, the Wartime Suspension of Limitations Act provided:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution

of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

3. As amended by the Surplus Property Act of 1944, Pub. L. No. 78-457, § 28, 58 Stat. 781, the Wartime Suspension of Limitations Act provided:

The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transac-

tions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

4. As amended in 1948, see Act of June 25, 1948, Pub. L. No. 80-772, § 3287, 62 Stat. 828, the Wartime Suspension of Limitations Act provided:

When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

5. 18 U.S.C. 3287 now provides:

Wartime suspension of limitations

When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

Definitions of terms in section 103[1] of title 41 shall apply to similar terms used in this section. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).

---

[1] See References in Text note below.

6. 31 U.S.C. 3730 provides, in pertinent part:

Civil actions for false claims

* * * * *

(b) ACTIONS BY PRIVATE PERSONS.—

* * * * *

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

* * * * *

(e) CERTAIN ACTIONS BARRED.—

* * * * *

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

7. 31 U.S.C. 3731 provides, in pertinent part:

False claims procedure

* * * * *

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

* * * * *

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-1497

SEP - 5 2014

IN THE

Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICES EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE CLEARING HOUSE ASSOCIATION L.L.C., AMERICAN HOSPITAL ASSOCIATION, AND THE AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus curiae briefs in cases raising issues of vital concern to the Nation's business community, including cases involving the False Claims Act ("FCA").

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2012 alone, PhRMA members invested an estimated $48.5 billion in efforts to research and develop new medicines. PhRMA's mission is to advocate public policies that encourage the discovery of life-saving and life-enhancing medicines. PhRMA closely monitors legal

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

issues that impact the pharmaceutical industry and frequently participates as amicus in this Court.

Established in 1853, The Clearing House Association L.L.C., is the nation's oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. The Association is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs, and white papers—the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the United States.

The American Hospital Association ("AHA") is a national not-for-profit organization that represents and serves nearly 5,000 hospitals, health care systems, and other health care organizations, plus 43,000 individual members. Its mission is to advance the health of individuals and communities by leading, representing, and serving the hospitals, health systems, and other related organizations that are accountable to the community and committed to health improvement. The AHA provides extensive education for health care leaders and is a source of valuable information and data on health care issues and trends. It also ensures that members' perspectives and needs are heard and addressed in national health policy development, legislative and regulatory debates, and judicial matters. The AHA

also has frequently participated as amicus curiae in cases with important consequences for its members, including cases arising under the FCA.

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all states and in all areas of medical specialization.

SUMMARY OF THE ARGUMENT

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences for the Nation's businesses and health care providers if the decision below is not reversed. The Fourth Circuit's combination of two far-reaching errors greatly expands the reach of the FCA. The interpretation of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, has the potential to toll indefinitely all statutes of limitations for all claims involving alleged fraud against the United States. Exacerbating the problem, the Fourth Circuit's interpretation of the so-called "first-to-file" provision of the FCA, 31 U.S.C. § 3730(b)(5), allows relators to file serial, duplicative actions so long as they are not active at the same time. If affirmed, the combined effect of these rulings will invite private plaintiffs and the Government to pursue indefinitely and repeatedly any claim involving alleged fraud against the Government. This elimination of all repose is not

only contrary to law but would impose significant burdens on businesses, hospitals and other health care providers. These entities, many of whom provide needed services to Government agencies and those served by Government programs, will be forced to defend against stale, repetitive, and frequently meritless claims.

The lower court's interpretation of the WSLA vastly expands the statute beyond its intended scope. Whereas the WSLA was intended to prevent criminal fraud prosecutions from lapsing due to the Government's wartime responsibilities, the Fourth Circuit's interpretation covers all FCA claims, whether civil or criminal and whether or not related to any war activities. And because hostilities abroad may never be terminated with the specificity required by the WSLA, that interpretation authorizes potentially indefinite tolling. Not only is such open-ended tolling of civil claims contrary to the purposes of the WSLA, but it is unnecessary, as both private relators and the Government have been able to file increasing numbers of civil FCA claims notwithstanding the nation's military commitments. The only result will be to increase the amount of stale, otherwise time-barred claims, the vast majority of which will prove meritless. This would improperly subject businesses and health care providers to continued uncertainty and the increased costs of defending against old claims, which will ultimately be borne by the consuming public.

The problem is compounded by the Fourth Circuit's erroneous interpretation of the FCA's "first-to-file" bar, which effectively renders inoperable an important statutory mechanism. That interpretation authorizes relators to file the same claims over and

over so long as they are not pending at the same time. Whereas the first-to-file bar was designed to create a "race to the courthouse" that induces whistleblowers to come forward quickly with evidence of fraud, the Fourth Circuit's interpretation permits another duplicative suit to be filed as soon as the prior suit is no longer pending. This encourages serial relators who bring forward no new information to try their luck with duplicative cases, wasting judicial resources. Eliminating the first-to-file bar's protection will subject defendants not only to the initial investigation that follows the first suit, but also years of costly litigation of meritless follow-on claims after the first suit is dismissed. The decision below should be reversed.

ARGUMENT

I. ALLOWING POTENTIALLY LIMITLESS TOLLING FOR A VAST ARRAY OF CIVIL CLAIMS WOULD SIGNIFICANTLY HARM U.S. BUSINESSES AND HEALTH CARE PROVIDERS.

The WSLA is a criminal code provision enacted in 1942 to extend the time for government prosecutors to bring charges related to criminal fraud offenses against the United States during times of war. It tolls the statute of limitations for "any offense" involving fraud against the federal Government "[w]hen the United States is at war." 18 U.S.C. § 3287. Until the Fourth Circuit's decision in this case, no circuit court had applied the WSLA to a civil FCA action, much less one brought by a private party. Pet. App. 35a (Agee, J., dissenting).

Under the ruling below, however, the WSLA (1) applies to both civil and criminal claims, even though

it is codified in the criminal code and expressly covers only "offenses"; (2) applies to private parties and not just government prosecutors; (3) applies whenever the United States is engaged in "armed hostilities," regardless whether the hostilities were commenced pursuant to a formal declaration of war; and (4) tolls limitations periods under all statutes involving fraud against the Government until the President issues a proclamation or Congress passes a concurrent resolution terminating hostilities, which may never in fact occur.

Such an interpretation would not significantly aid the fight against actual fraud, which is already well-served by the existing tools available under the FCA and its generous statutes of limitation and repose. Instead, the Fourth Circuit's rule would only empower unaccountable private relators, as well as the Government, to seek to revive decades-old stale civil claims that are otherwise barred by the statute of limitations and repose, imposing significant unwarranted costs on the Nation's businesses and health care providers. By contrast, the true purpose of the WSLA—ensuring that prosecutions of criminal actions are not compromised by the unavailability of prosecutorial resources during periods of war—will be fully served if the statute is properly limited to its intended realm of criminal cases.

A. The Decision Below Erroneously Authorizes Virtually Unlimited Tolling For All Civil FCA Claims.

Even though the WSLA covers only "offense[s]" involving fraud or attempted fraud against the United States, 18 U.S.C. § 3287(1), and is located among the criminal provisions of Title 18 of the U.S. Code, the Fourth Circuit erroneously held that it

applies to civil claims. Pet. App. 14a. As petitioners have explained in detail, the statutory term "offense" plainly covers only criminal offenses, not civil claims. *See* Pet. Br. 19-29.

This result is in accord with the intended purpose of the WSLA, which was enacted to give extra time to government prosecutors "[i]n view of the opportunity to commit such frauds in time of war, and in view of the difficulty of their prompt discovery and prosecution." *Bridges* v. *United States*, 346 U.S. 209, 222 (1953). As the Court has explained, the "fear" that led to the WSLA's enactment "was that the law-enforcement officers would be so preoccupied with prosecution of the war effort that the crimes of fraud perpetrated against the United States would be forgotten until it was too late." *United States* v. *Smith*, 342 U.S. 225, 229-29 (1952). "The implicit premise of the legislation is that the frenzied activities, existing at the time the Act became law, would continue until hostilities terminated and that until then the public interest should not be disadvantaged." *Id.* at 229; *see also* S. Rep. No. 77-1544, 2d Sess., at 2 (1942) (WSLA was enacted to ensure that "limitations statute will not operate, under stress of [wartime].").

The Fourth Circuit's ruling expands the reach of the statute far beyond its intended realm. Although the court applied the WSLA in this case because it considered the United States to have been "at war" in Iraq since October 2002, Pet. App. 12a, its interpretation of the WSLA is not restricted to war-related industries or defense contractors. Rather, it covers all FCA actions, which include such disparate areas as health care, banking and financial services and procurement. Thus, since the Fourth Circuit's

ruling private relators and the Government have asserted the WSLA as grounds for tolling limitations in numerous civil cases having nothing to do with the prosecution of war or the military.[2] Moreover, the ruling invites the plaintiffs' bar and the Government to argue that the WSLA covers claims brought under other statutes beyond the FCA. *See, e.g.*, 42 U.S.C. § 1320a-7a (health care fraud); 18 U.S.C. § 3287(2)

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[2] *See, e.g., United States ex rel. Landis* v. *Tailwind Sports Corp.*, --- F. Supp. ---, No. 10-cv-00976, 2014 WL 2772907, *20 (D.D.C. June 19, 2014) (WSLA did not toll FCA limitations in U.S.-intervened case involving Lance Armstrong's cycling sponsorship agreements); *United States ex rel. State of Texas* v. *Planned Parenthood Gulf Coast, Inc.*, --- F. Supp. 2d ---, No. H-12-3505, 2014 WL 1933554, *7 (S.D. Tex. May 14, 2014) (WSLA tolled FCA limitations in non-intervened health care case); *Weslowski* v. *Zugibe*, --- F. Supp. 2d ---, No. 12-cv-8755 (KMK), 2014 WL 1612967, *11 (S.D.N.Y. Mar. 31, 2014) (WSLA did not toll FCA limitations in FCA retaliation case); *Hericks* v. *Lincare, Inc.*, No. 07-387, 2014 WL 1225660, *14 n.16 (E.D. Pa. Mar. 25, 2014) (WSLA did not toll FCA limitations in non-intervened health care case); *United States ex rel. Bergman* v. *Abbot Labs.*, No. 09-4264, 2014 WL 348583, *16 (E.D. Pa. Jan. 30, 2014) (WSLA did not toll limitations in non-intervened health care case); *United States* v. *Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 613-14 (S.D.N.Y. 2013) (WSLA tolled FCA limitations in U.S.-commenced home mortgage case); *United States ex rel. Emanuele* v. *Medicor Assocs.*, No. 10-245, 2013 WL 3893323, *7 (W.D. Pa. July 26, 2013) (WSLA did not toll FCA limitations in non-intervened health care case); *United States ex rel. Paulos* v. *Stryker Corp.*, No. 11-0041-CV, 2013 WL 2666346, at *15 (W.D. Mo. June 12, 2013) (WSLA tolled FCA limitations in non-intervened health care case); *United States* v. *BNP Paribas SA*, 884 F. Supp. 2d 589, 597-609 (S.D. Tex. 2012) (WSLA tolled FCA limitations in U.S.-commenced case involving bank statements). *See also United States* v. *Moutady*, --- F. Supp. 2d ---, No. 13-cv-2227 (JMF), 2014 WL 1357330, *5 n.4 (S.D.N.Y. Apr. 7, 2014) (holding in alternative that WSLA tolls limitations in U.S.-commenced case involving home mortgages, although issue not raised by Government).

(WSLA also applies to any "offense * * * committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States").

The decision below also potentially authorizes *indefinite* tolling of all FCA claims. The Fourth Circuit held that the WSLA tolled the running of the statute of limitations due to the hostilities in Iraq, without tying that triggering event to a formal war declaration. Where the WSLA applies, limitations periods are tolled "until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress," 18 U.S.C. § 3287(3).[3] This formal declaration has not yet happened for the Iraq hostilities, and may never come. Indeed, since the attacks of September 11, 2001, the United States has been continually engaged in numerous undeclared "armed hostilities," Pet. App. 12a, in Afghanistan, Iraq, and other countries—none of which has been terminated through the formalities set forth in the WSLA. *See also* Barbara Salazar Torreon, Congressional Research Service, *Instances of Use of United States Armed Forces Abroad*, 1798-2014 (Jan. 13, 2014) (www.fas.org/sgp/crs/natsec/R42738.pdf) (listing more than 330 U.S. foreign military operations in 216 years). Hence, the Fourth Circuit's interpretation of the WSLA would result in potentially limitless tolling of the limitations period for all FCA cases whenever the United States has

[3] The prior version required similar formalities to terminate tolling. *See* 18 U.S.C. § 3287 (2006). As noted in the petition (Pet. 17 n.4) it is unnecessary to decide which version applies to this case.

determined that, notwithstanding a state of armed conflict, it is not so significant that it warrants a formal declaration of war or peace.

By tolling civil limitations periods in this way, the Fourth Circuit's decision, if affirmed, would create incentives that are contrary to the FCA's purposes. The FCA, through the first-to-file bar discussed below, "reflects Congress' explicit policy choice to encourage prompt filing and, in turn, prompt recovery of defrauded funds by the United States." *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 313 n.11 (2010) (Sotomayor, J., dissenting). But if the WSLA is applied to civil cases brought by private relators, those relators could "'have a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery.'" Pet. App. 37a-38a (Agee, J., dissenting) (citation omitted). Suspending limitations periods for private relators would "undermine the very purpose of the *qui tam* provisions of the FCA," which are "'to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not.'" *Id.* at 38a (citation omitted).

These perverse outcomes are predictable given that private relators seeking windfall gains have different incentives than the criminal prosecutors to whom the WSLA was actually directed. If the statute is properly limited to criminal cases, prosecutorial discretion may help prevent overreaching in bringing stale criminal charges. Yet applying the WSLA to civil claims would allow private relators to litigate, on the Government's behalf, otherwise time-barred civil cases that the Government itself has deemed

unworthy of further pursuit. As courts outside the Fourth Circuit have held, applying the WSLA to civil FCA claims is contrary to the WSLA's true purposes. *See Bergman*, 2014 WL 348583, at *16 ("the WSLA does not toll the FCA's statute of limitations for relators without the government's intervention, especially when those cases do not involve military or war-related contracts"); *Emanuele*, 2013 WL 3893323, at *7 (holding that the WSLA does not apply to relator-initiated FCA claims "where the United States is not a party").

Such an expansion of tolling is unsupported by the recognized purpose of the WSLA to provide a wartime, resource-drained Government with additional time to pursue and prosecute criminal fraud offenses. *See Smith*, 342 U.S. at 228 (under WSLA, "offenses occurring prior to the termination of hostilities shall not be allowed legally to be forgotten in the rush of the war activities"). Unlike with government prosecutors, there is no similar concern that private civil relators will face a drain on their resources or be otherwise distracted by activities relating to wartime duties, thereby preventing the timely filing of civil FCA claims. Tolling is thus a complete boon for civil relators.

Nor do civil FCA cases, even when brought by the Government, raise the concern that animates the WSLA—that parties might avoid punishment for serious criminal offenses during time of war. *See id.* at 229. Moreover, civil cases are not subject to the speedy trial clause of the Sixth Amendment or the Speedy Trial Act, 18 U.S.C. §§ 3161-74, which would otherwise limit the Government's ability to delay criminal prosecutions due to wartime exigencies.

And the Government does not need tolling of limitations for civil *qui tam* FCA cases as a result of resource constraints. That is because the Government, for good cause, can (and almost always does) obtain repeated extensions to keep a case under seal to facilitate its investigation. *See* 31 U.S.C. § 3730(b)(3). Although the FCA provides only for a 60-day seal period, *qui tam* cases remain under seal for an average of 13 months. *See* Jan. 24, 2011 Letter from DOJ & HHS to Hon. Charles E. Grassley at 14 (available at www.taf.org/DOJHHS-joint-letter-to-Grassley.pdf).

Finally, the Fourth Circuit's decision is also contrary to the Court's recognition that the FCA contains an "absolute provision for repose" after 10 years. *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1224 (2013); *see* 31 U.S.C. § 3731(b) (a civil action may be brought "*in no event* more than 10 years after the date on which the violation is committed") (emphasis added). By overriding that limitation, the Fourth Circuit has effectively abolished the congressionally imposed constraints on the FCA. *See United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 647 (7th Cir. 2013) ("*Gabelli* tells us not to read statutes in a way that would abolish effective time constraints on litigation."); *see also Rotella* v. *Wood*, 528 U.S. 549, 554 (2000) (rejecting a rule that would have "extended the limitations period to many decades, and so beyond any limit that Congress could have contemplated" and "would have thwarted the basic objective of repose underlying the very notion of a limitations period").

B. Unlimited Tolling Would Unnecessarily Threaten U.S. Businesses And Health Care Providers With Stale And Meritless Claims.

Indefinite tolling of limitations for civil FCA claims is not necessary to root out actual fraud, and would instead subject U.S. businesses to unpredictable liability for aged claims—the vast majority of which have no merit—and require them to incur ever-increasing costs to defend against those claims.

Although the United States remains engaged in conflicts abroad, no wartime exigencies have prevented the Government or private relators from seeking to recover for alleged civil fraud. FCA claims are at all-time high, and both the Government and private relators have demonstrated that they have ample time and resources to devote to the effort. At the end of 2013, the Department of Justice ("DOJ") noted that fighting civil fraud was a "high priority," and trumpeted "another banner year" for FCA enforcement. DOJ, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (Dec. 20, 2013) (www.justice.gov/opa/pr/2013/December/13-civ-1352.html) ("*DOJ 2013 Press Release*"). Thus, by its own terms, the Government's efforts to combat alleged fraud have not been bridled by war.[4]

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[4] Despite its successes, the Government has nonetheless still decided to invoke the WSLA with frequency. *See* Reed Albergotti, *U.S. Uses Wartime Law to Push Cases into Overtime*, Wall St. J., Apr. 16, 2013, at C1 (noting that the Government's "use of that law has more than doubled" just since 2008, and the Government has invoked the provision to toll fraud claims more in just the past four years than in the previous 47 combined).

Nor have *qui tam* relators experienced any wartime fatigue. For nearly a decade—even though the country has been continually engaged in hostilities abroad—*qui tam* FCA litigation has been expanding dramatically. From 2006, when respondent Carter filed his first *qui tam* complaint, until 2013, over 300 *qui tam* actions have been filed annually. DOJ, *Fraud Statistics—Overview: Oct. 1, 1987 – Sept. 30, 2013*, at 1-2 (2013) (www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf). In the 2013 fiscal year, the number dramatically increased by over 100 (13.4%), up to 753. *Id.* at 2. That is an average of more than fourteen new lawsuits filed every week under a single federal statute.

Government defense contractors, such as the petitioners in this case, are an increasing target of *qui tam* suits. FCA *qui tam* claims involving the Defense Department jumped by 35% in the fiscal year 2013. DOJ, *Fraud Statistics—Department of Defense: Oct. 1, 1987 – Sept. 30, 2013*, 1-2 (2013). The DOJ pronounced last year "a record year for procurement fraud matters." *DOJ 2013 Press Release*, *supra*. Furthermore, it is possible that FCA relators may attempt to use the WSLA not only to toll the running of the FCA's statute of limitations, but indirectly to evade the six-year limitation on contract disputes by presenting otherwise barred contract claims as FCA claims. *See* David M. Nadler & Joseph R. Berger, *Fourth Circuit Decision On WSLA Paves Way For FCA Forum Shopping And More Stale Claims*, 55 Government Contractor ¶ 168 at 3 (June 5, 2013).

The health care industry also continues to be a primary target of FCA suits. *See* James J. Belanger & Scott M. Bennett, *The Continued Expansion of the*

False Claims Act, 4 J. Health & Life Sci. L. 26, 28 (2010). Recent FCA amendments have caused an "explosion" of *qui tam* suits against health care companies. *See* Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 Penn. St. L. Rev. 77 96 (2011). Of the 13,766 FCA cases brought between 1987 and 2013, 6,053, or nearly 44%, have involved the health care industry. DOJ, *Fraud Statistics – Health and Human Services Oct. 1, 1987 – Sept. 30, 2013* at 2 (2013). In fiscal year 2013, 500 out of 753 new *qui tam* FCA matters (over 66%) involved the Department of Health and Human Services as the primary client agency. *Id.* Notwithstanding the nation's military commitments, the Government has consistently increased its budgetary requests for combatting alleged health care fraud. Scott Becker & Molly Gamble, *The Growth of Healthcare Fraud Qui Tam Lawsuits*, Becker's Hospital Review (Nov. 26, 2013) (www.beckershospitalreview.com/legal-regulatory-issues/the-growth-of-healthcare-fraud-qui-tam-lawsuits.html).

Thus, there is no need to indefinitely toll civil FCA claims during the country's ongoing military hostilities, as both *qui tam* relators and the Government have had no difficulty filing such claims with increasing regularity. Allowing such tolling would instead only subject businesses and health care providers to additional stale claims, the vast majority of which will prove meritless. American businesses, like the Government and the American public, have an interest in rooting out fraud. There is strong evidence, however, that the vast majority of *qui tam* relator suits are meritless, serving only to inflict costs on businesses (and ultimately the

public). More than 76% of FCA actions brought between 2006-2013 were *qui tam* relator actions, with such actions accounting for 89% of the total in 2013. *Fraud Statistics: Overview*, *supra*, at 1-2. Once its investigation is complete, the United States historically has declined to participate in approximately 78% of these *qui tam* suits. Christina O. Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 971 (2007) (study of suits from 1987-2004). Tellingly, from 1987-2013, *qui tam* actions in which the Government declined to intervene accounted for only 3.6% of total *qui tam* monetary settlements and judgments. *Fraud Statistics: Overview*, *supra*, at 1-2. For the health care industry, *qui tam* cases in which the Government declines to participate result in less than 2.4% of all recoveries. *Fraud Statistics: Health and Human Services*, *supra*, at 1-2.

The vast majority of *qui tam* cases declined by the Government are meritless. According to a comprehensive empirical analysis, 92% of cases in which the U.S. declined to intervene were dismissed without recovery. Broderick, *supra*, at 975 (using data from 1987 to 2004). Thus, less than 10% of non-intervened private *qui tam* actions actually result in recovery, with more than 90% being dismissed as frivolous or otherwise without merit. *Id.*; *see also* Todd J. Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor?*, 37 Pub. Cont. L.J. 1, 9 (2007). As explained above, *supra* at 12, the FCA itself provides the Government with the ability to delay *qui tam* cases if necessary to facilitate its own investigation. And when the Government does not intervene, it almost always allows relators to proceed with claims that the

Government has deemed unworthy of its own participation. Although the DOJ has the authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss any *qui tam* suit, it rarely does so, allowing a substantial majority of *qui tam* relator cases to proceed unabated. *See* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-65 (2007-08). "[T]he result is that the government does not dismiss, and relators are permitted to proceed with, thousands of non-meritorious qui tam suits." *Id.*

American businesses and health care providers undergo significant hardship—both financial and reputational—as a result of meritless *qui tam* FCA claims. Defending against an FCA claim is very costly and requires a "tremendous expenditure of time and energy." Canni, *supra*, at 11 n.66. As demonstrated by the present case, these meritless lawsuits can continue for years before dismissal. Further, the defendant may also be motivated to settle, despite the lack of merit, to avoid the potentially enormous expenditures of money and time needed to defend such suits. *Id.* at 11-12.

Similarly, defendants suffer significant reputational harm from these meritless lawsuits. Because "the mere presence of allegations of fraud may cause [federal] agencies to question the contractor's business practices," *id.* at 11, businesses that rely on contracting with the Government unnecessarily have their reputations damaged. *Id.* at 10-11. Ultimately, the costs of the litigation in the vast majority of relator *qui tam* cases, "outweigh[s] any benefit to the public." Rich, *supra*, at 1264. Most non-intervened

suits "exact a net cost," as defendants must expend financial resources to defend against meritless claims and suffer unwarranted damage to their reputations. *Id.*; *see also* Canni, *supra*, at 2.

Allowing defendants to be subjected to an uncertain range of claims that were long since understood to have been time-barred exacerbates the problems caused by meritless *qui tam* litigation. The Fourth Circuit's WSLA ruling has already precipitated the assertion of the WSLA in numerous other cases. *See supra* note 2. Were this Court to extend that ruling across the country, the impact could be substantial. The WSLA would have tolled the statute of limitations since at least October 2002 when Congress authorized the President to use military force in Iraq. Pet. App. 12a. Moreover, before 2002 the United States engaged in other similar undeclared "armed hostilities," *id.*, such as the armed conflict in Afghanistan that begin in 2001 or even the Persian Gulf War that began in 1991. These conflicts have yet to be formally terminated in the manner set forth in the WSLA, leading to the possibility that plaintiffs will seek to assert even older claims, sprouting further litigation.

The unwarranted costs of defending against *qui tam* claims by private relators are even greater for stale claims. Statutes of limitations "embody a 'policy of repose, designed to protect defendants.'" *Lozano* v. *Alvarez*, 134 S. Ct. 1224, 1234 (2014) (quoting *Burnett* v. *New York Cent. R. R. Co.*, 380 U. S. 424, 428 (1965)). Statutes of limitation and repose "foster the 'elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Id.* (quoting *Rotella*, 528 U.S. at 555); *John R. Sand & Gravel*

Co. v. *United States*, 552 U.S. 130, 133 (2008) (limitations "protect defendants against stale or unduly delayed claims"). They protect not only defendants but also courts from "having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

Permitting claims under the FCA to be tolled potentially *ad infinitum* would create significant uncertainty as to the range of possible liability businesses might face. Businesses will also never know when they may "close the books" on any particular matter, requiring additional costs to preserve evidence and plan for unknown contingencies. And they will incur significant expenses in attempting to defend against decades-old claims. These are exactly the kind of difficulties that the FCA's statutes of limitations and repose were enacted to avoid. Indefinite tolling of civil FCA claims is inconsistent with the language of the WSLA, is wholly unnecessary, and would serve only to swamp businesses with an increasing number of stale, meritless claims whose litigation costs must ultimately be borne by the American public. The Fourth Circuit's decision authorizing such tolling should be reversed.

II. THE FIRST-TO-FILE BAR DOES NOT ALLOW DUPLICATIVE, SERIALLY-FILED CLAIMS.

The error of the Fourth Circuit's WSLA ruling is compounded by its erroneous interpretation of the FCA's first-to-file bar. Lifting the "first-to-file" bar whenever a first-filed case is no longer active

improperly encourages the filing of multiple, duplicative claims seriatim. And because the WSLA was held to toll limitations even for private FCA claims, under the lower court's rule relators may serially file duplicative claims indefinitely.

The first-to-file bar provides: "When a person brings [a *qui tam* FCA] action * * * no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). This bar is absolute—"no person other than the Government may * * * bring a related action"—and it takes effect immediately upon the filing of the first case. *See United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) (Section 3730(b)(5)'s plain language is "exception-free").

Contrary to the decision below, the statute provides no end point for application of the first-to-file bar against related cases. The statutory words "pending action" impose no time limit, but rather are just a means of specifying the first-filed action. As the D.C. Circuit recently concluded, "[t]he simplest reading of 'pending' is the referential one; it serves to identify which action bars the other." *United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343-44 (D.C. Cir. 2014). The first-to-file rule bars new suits "even if the initial action is no longer pending," and "pending action," as used in the statute, is "shorthand for first-filed action," and does not mean something like "still active action." *Id.*; *see also United States ex rel. Powell* v. *Am. Intercont'l Univ., Inc.*, No. 1:08-CV-2277-RWS, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012) (the word "'pending' is used as a short-hand for the first-filed action, and 'pending' was used instead of some other term so that the courts would

compare the first-filed action's most recent allegations with the second-filed action's complaint").

The bar on related cases takes effect as soon as the first action is pending, and nothing in the statute terminates that bar when that action is concluded. If Congress wanted to say that the bar applies only "while the earlier-filed action is pending," Congress would have said precisely that. *See Shea*, 748 F.3d at 344 (contrasting other statutes in which Congress has used the term "pending" to bar suits on a temporal basis and concluding that "Congress excluded similar language in the first-to-file bar").

This is in accord with the purpose underlying *qui tam* FCA actions. "A whistleblower sounds the alarm; he does not echo it." *United States ex rel. Green* v. *Northrop Corp.*, 59 F.3d 953, 966 n.11 (9th Cir. 1995) (citation omitted). The statute "awards the spoils to those vigilant enough to blow the whistle first, not to every whistle-blower." *United States ex rel. Batiste* v. *SLM Corp.*, 740 F. Supp. 2d 98, 102 (D.D.C. 2010), *aff'd*, 659 F.3d 1204 (D.C. Cir. 2011). "[O]nce the Government has notice of potential fraud, the purposes of the FCA are vindicated" and "the policies behind the statute do not support successive suits simply because the first suits were dismissed." *Powell*, 2012 WL 2885356, at *5. As the D.C. Circuit has reasoned:

> The resolution of a first-filed action does not somehow put the government off notice of its contents. On the other hand, reading the bar temporally would allow related *qui tam* suits indefinitely—no matter to what extent the government could have already pursued those claims based on earlier actions. Such duplicative

> suits would contribute nothing to the government's knowledge of fraud.

Shea, 748 F.3d at 344. There is "no reason why the rule should be read to bar a related claim one day but not the next." *Id.*

"Once the government is put on notice of its potential fraud claim"—which happens when the first action is filed—"the purpose behind allowing qui tam litigation is satisfied." *Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004). *See also Lujan*, 243 F.3d at 1188 ("Dismissed or not, [the first-filed] action promptly alerted the government to the essential facts of a fraudulent scheme-thereby fulfilling a goal behind the first-to-file rule."); *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011) (Congress intended to prohibit "copycat actions that provide [the Government] no additional material information").

The Fourth Circuit's interpretation of the first-to-file bar, however, frustrates this statutory design and "create[s] perverse incentives and 'reappearing' jurisdiction." *Powell*, 2012 WL 2885356, at *5. The statute intentionally facilitates a "race to the courthouse" because "once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *United States ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 377, 378 (5th Cir. 2009) (quotation omitted). If the first-to-file bar ends when the first action is dismissed, however,

> a race to the courthouse would not occur as subsequent relators would wait hoping that the first-filed action would be dismissed, and fraud would continue to occur in the interim. Moreover,

> a relator would be able to file, dismiss, and re-file identical *qui tam* actions, thus encouraging forum shopping and wasting government resources that would be required to review the claims in each action.

Powell, 2012 WL 2885356, at *5.

Businesses, moreover, would be subjected to serial, duplicative claims without any corresponding public benefit. Indeed, as the D.C. Circuit has noted, one of the purposes of the first-to-file bar is "'rejecting suits which the government is capable of pursuing itself.'" *Shea*, 748 F.3d at 342 (quoting *Batiste*, 659 F.3d at 1208). When the Government determines there is merit to a suit, it can pursue it, but most of the time it does not. As noted above, the private *qui tam* cases in which the Government does not intervene comprise a large majority of FCA cases but account for only a miniscule percentage of total recoveries. *See supra* at 15-17. But these are the kind of cases most likely to be kept alive by the Fourth Circuit's ruling. The first-filed suit will have already put the Government on notice of the potential fraud, giving it the opportunity to investigate and intervene. When the Government does not intervene, the relator will often voluntarily dismiss that suit without a preclusive judgment. *See Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). Yet if the Court were to adopt the Fourth Circuit's ruling, future relators (including repeat relators) will be able to bring duplicative claims even though the Government—the real party in interest—has already been alerted to the alleged fraud and has declined to pursue it. *See* Pet. App. 22a.

Such a rule will inflict substantial costs on businesses defending duplicative suits without any

appreciable gains in ferreting out actual fraud, and further burden the U.S. court system. Every suit filed drains resources from all involved, and repetitive suits by private relators simply clog the courts. The first-to-file bar is a recognition by Congress that "overly generous *qui tam* provisions present the danger of parasitic exploitation of the public coffers." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). This parasitism imposes burdens on the defendants that must engage in expensive litigation to respond to them, and on the courts that must handle repetitive litigation, all for "information that was already in the government's possession." *Id.*

Serial relators have been commonplace in FCA suits ever since Congress raised the percentages of damages recoverable to relators and authorized treble damages in the 1980s. More than two dozen people or groups have filed five or more *qui tam* suits since 1986, with one entity bringing at least 35 *qui tam* suits against health care companies. *See* Peter Loftus, *Invoking Anti-Fraud Law, Louisiana Doctor Gets Rich*, Wall St. J., July 24, 2014. If affirmed, the Fourth Circuit's interpretation of the first-to-file rule would embolden these serial relators, imposing unnecessary costs on defendants and courts while doing little to uncover fraud. Respondent Carter has already filed four complaints containing the same allegations, which were also the subject of three other prior *qui tam* actions. Pet. Br. 58. Each time, the Government has declined to intervene. *Id.* And yet, if the decision below is allowed to stand, neither the statute of limitations nor the first-to-file provision would bar him from filing another case with the same allegations, more than eight years

after the underlying events. Pet. App. 22a. The first-to-file rule was intended to prevent such burdensome litigation once the Government is already alerted to an alleged fraud. The court's ruling below, by contrast, affirmatively fosters it.

CONCLUSION

For the foregoing reasons, and those in the petitioner's brief, the Court should reverse the judgment below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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KELLOGG BROWN & ROOT SERVICES, INC., ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. BENJAMIN CARTER,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, THE COALITION FOR GOVERNMENT PROCUREMENT, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Defense Industrial Association ("NDIA"), a non-profit, non-partisan organization, has a membership consisting of over 90,000 individuals and 1,780 companies, including some of the Nation's largest defense contractors. Promoting national security since 1919, NDIA encourages a vigorous and ethical forum of information exchange between the government and the defense industry. Due to the large number of civil False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, lawsuits targeting defense contractors, NDIA seeks to ensure that the scope of FCA liability does not expand beyond Congress's intentions.

The Coalition for Government Procurement ("CGP"), a national trade association, represents commercial contractors in the federal market. For more than 30 years, CGP has advocated for commonsense policies that improve the acquisition environment for the government, industry players, and, ultimately, the American public. As such, CGP has a strong interest in the correct application of the civil FCA.

The National Association of Manufacturers ("NAM"), the largest association of manufacturers in the Nation, represents small and large

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amici* and their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties filed blanket letters of consent to *amicus curiae* briefs with the Clerk of the Court.

manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM advocates for sensible approaches to the law that help manufacturers compete in the global economy and create jobs across the Nation.

Accordingly, the *amici* have a significant interest in the Fourth Circuit's decision below, which radically extends and potentially eradicates the FCA's statute of limitations. While *amici* have an interest in and support petitioners on the first-to-file question, *amici* herein particularly address the first question posed to this Court, concerning application of the Wartime Suspension of Limitations Act ("WSLA"), 18 U.S.C. § 3287, to the civil FCA.

SUMMARY OF ARGUMENT

This case presents the opportunity for this Court to prevent an unwarranted judicial expansion of the WSLA far beyond the text of the statute and contrary to Congressional intent. If allowed to stand, the Fourth Circuit's decision not only would sanction the WSLA's application to the post-1986 civil FCA – effectively eliminating the FCA's statute of limitations – but also would permit it to reach other civil statutes as well.

The Fourth Circuit's decision is at odds with this Court's recent reaffirmation of "the basic policies of

all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities," *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)) (internal quotation marks omitted), and prior emphasis that the WSLA be given a "conservative interpretation" in favor of repose, *Bridges v. United States*, 346 U.S. 209, 216 (1953). It also rests on a flawed interpretation of the text of both statutes and ignores important historical context and legislative history manifesting that Congress never intended the WSLA to apply in such an expansive manner.[2]

The WSLA is a 72-year-old criminal code provision, with even deeper criminal code roots, that suspends the statute of limitations for "any offense" involving fraud or attempted fraud against the government when the country is at war. Some courts mistakenly have concluded that the term "offense" now applies to civil violations as well.

According to the Fourth Circuit, this wholesale transformation – from a criminal-only provision to one that applies to both criminal and civil conduct – took place by omission. Acknowledging that the WSLA originally applied solely to criminal code

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[2] The Fourth Circuit's decision has been invoked in various jurisdictions, including in civil FCA cases having no relation to wartime contracting. *See, e.g., United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 610-11 & n.10 (S.D.N.Y. 2013); *United States ex rel. Paulos v. Stryker Corp.*, No. 11-0041, 2013 U.S. Dist. LEXIS 82294, at *50-51 (W.D. Mo. June 12, 2013), *aff'd*, 2014 U.S. App. LEXIS 15199 (8th Cir. Aug. 7, 2014) (affirming dismissal on original source grounds).

offenses, the Fourth Circuit's expansionist reasoning rests almost exclusively on Congress's removal of the words "now indictable" in the 1944 version of the statute. But ample legislative history offers a far more plausible explanation for the deletion of the phrase "now indictable under any existing statutes" – namely, that Congress made the WSLA applicable not only to offenses already committed for which indictment was still possible at the time of suspension, but also to crimes not yet committed. Notably, both before and after the 1944 amendments to the WSLA, the legal definition of "offense" consistently has meant a crime.

Similarly, while the Solicitor General reasons that "Congress's failure to include language limiting the WSLA to crimes" indicates Congress intended WSLA application in the civil context, *see* Brief for the United States as *Amicus Curiae* at 10-11 & n.3, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, No. 12-1497 (May 27, 2014), no such conclusion is warranted. To the contrary, the lack of direct language *including* civil claims within the ambit of the WSLA – a Title 18 provision with suspension periods that mirror the criminal statute of limitations – is evidence that Congress did not intend it to apply in the civil context. This is particularly apt given that Congress, in contemporaneous and analogous legislation, used both "violation" and "civil proceeding" to articulate a suspension statute's reach when it intended civil limitations periods to be included.

As discussed in Part II below, the Fourth Circuit compounded its improper application of the WSLA to

civil limitations periods by applying it to today's civil FCA. Specifically, the court failed to appreciate that the 1986 amendments to the civil FCA included a statutory definition of "knowing" that disqualifies WSLA application pursuant to this Court's "essential ingredient" test. *See United States v. Grainger*, 346 U.S. 235, 242-43 (1953); *Bridges*, 346 U.S. at 220-23; *United States ex rel. Landis v. Tailwind Sports Corp.*, No. 10-00976, 2014 U.S. Dist. LEXIS 83313, at *67-72 (D.D.C. June 19, 2014).

Amici respectfully submit that the Fourth Circuit's statutory and legislative history analyses are flawed and incomplete. This Court should reverse the judgment below.

ARGUMENT

I. THE WSLA'S HISTORY SUPPORTS LIMITING ITS APPLICATION TO CRIMES

The WSLA's history – traceable in important part to the earliest laws of this Nation – demonstrates that the WSLA always was, and today remains, a statute that solely affects criminal statutes of limitations.

Indeed, the WSLA's roots are in statutes where the use of the term "offense" was limited to the distinction between capital and non-capital crimes. The legal definition of "offense" has not materially changed over time, and it is therefore no surprise that the WSLA, the application of which is limited to "offense[s]," is codified in Title 18.

While some courts – including the Fourth Circuit – have seized upon Congress's removal of the phrase "now indictable" from the WSLA in order to justify expanding its reach into the civil arena, the WSLA's legislative history supports no such reasoning and, instead, compels a far more plausible explanation for that language change. As described below, in 1921 and then again in 1942, Congress passed retrospective legislation to address the limitations period for certain offenses already committed or "now indictable under any existing statutes" at the time of enactment. In 1944, Congress removed the "now indictable under any existing statutes" language when it replaced the 1942 interim measure with a forward-looking provision that also would account for suspension of the limitations period for qualifying offenses not yet committed. No legislative history supports the notion that Congress intended or achieved a wholesale expansion of the WSLA to civil fraud statutes when it removed the "now indictable" language. To the contrary, contemporaneous antitrust legislation shows how Congress directly would have accomplished such an extension.

Moreover, the fact that Congress consistently has maintained symmetry between the WSLA's suspension period and the ordinary criminal statute of limitations further evidences the statute's exclusively criminal scope.

A. The WSLA's Earliest Origins Are "Criminal"

In 1790, Congress first enacted a general statute of limitations for federal crimes, imposing a two-year

limitations period for non-capital offenses. Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119. This limitations period remained the law for over 85 years and was codified in the initial edition of the Revised Statutes of the United States as follows: "No person shall be prosecuted, tried, or punished for any offense not capital, except as provided in section one thousand and forty-six [*i.e.*, revenue and slavery offenses], unless the indictment is found or the information is instituted within two years next after such offense is committed." Rev. Stat. § 1044 (1875).

Barely a year after codification, Congress lengthened the limitations period to three years. Act of Apr. 13, 1876, ch. 56, 19 Stat. 32. In so doing, Congress specifically excluded crimes already "barred by the provisions of existing laws" such that the existing limitations period had run. *Id.* As codified, the statute provided:

> No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six [*i.e.*, revenue and slavery offenses], unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense, barred by the provisions of existing laws.

Rev. Stat. § 1044 (1878).

This remained the rule until 1921, when Congress enacted its first distinct limitations period – six years – for crimes of fraud against the government. Act of Nov. 17, 1921, ch. 124, 42 Stat. 220 (an act "relating to limitations in criminal cases"). Similar to the current WSLA,[3] that act addressed "offenses involving the defrauding or attempts to defraud the United States":

> *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

Id.

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[3] In the aftermath of World War I, Congress was concerned with providing the government adequate time to determine "whether prosecutions are justified or not" and "to begin the necessary prosecutions" for criminal offenses "which are claimed to have occurred during the war with Germany and since its conclusion." H.R. REP. NO. 67-365, at 1-2 (1921). Congress stated that "[m]any of these alleged offenses grew out of the contractural [sic] relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies" and that, given the passage of time, "many of these alleged crimes are already barred." *Id.*

Contemporaneous legal provisions made clear that Congress intended the term "offenses" to mean crimes. As Congress considered the 1921 act, the very section of the Revised Statutes that the act would amend, Rev. Stat. § 1044 (1878), and an immediately adjacent section, Rev. Stat. § 1043 (1878), divided offenses into those "capital" and "not capital," a manifestly criminal dichotomy that continued into the United States Code, *see* 18 U.S.C. §§ 581-82 (1925-26). Similarly, a 1909 act that served to "codify, revise, and amend the penal laws of the United States," classified certain offenses as "[f]elonies" and provided that "[a]ll other offenses shall be deemed misdemeanors." Act of Mar. 4, 1909, ch. 321, § 335, 35 Stat. 1088, 1152 (later codified at 18 U.S.C. § 541 (1925-26)).[4] The ordinary legal meaning of the word "offense" at that time was in accord: "[a] crime or misdemeanor; a breach of the criminal laws." *Black's Law Dictionary* 847-48 (2d ed. 1910).

Congress knew what "offense" meant. In fact, prior to passage of the 1921 amendment, it debated whether to expand the statute of limitations in the civil arena as well. During debate, Senator Walsh observed that "[t]his bill affects only criminal liability" and expressed the opinion that "I think we ought to safeguard the interests of the Government so far as the civil liability * * *, as well as the criminal responsibility." 61 CONG. REC. 7640 (1921).

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[4] Although the law was a re-codification of the entire criminal code in most respects, it left preexisting statutes of limitation, such as Rev. Stat. § 1044, in place. *See* Act of Mar. 4, 1909, ch. 321, § 344, 35 Stat. 1088, 1159.

Senator La Follette agreed and inquired about amending the bill to apply to civil claims. *Id.* Senator New replied that "[w]hile what [Senator Walsh] says is true, that we ought also to provide for the recovery of damages in civil suits, I think it is best to provide for that in a separate bill and not to delay the passage of this one through any attempt to amend it in any way." *Id.*

This Court also recognized that the 1921 act addressed only crimes, as it "relate[d] to all crimes, excepting only capital offenses," served "to carve out a special class of cases" from among those crimes, and should "be construed strictly." *United States v. McElvain*, 272 U.S. 633, 639 (1926); *cf. United States v. Scharton*, 285 U.S. 518, 522 (1932) ("[A]s [an analogous revenue provision] has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses.").

B. Congress Used The "Now Indictable" Language To Reflect Retroactivity – A Concern Having No Relation To Civil Liability

When the United States Code was first promulgated, the 1921 act was codified in Title 18 ("Criminal Code and Criminal Procedure") with minor alterations. However, the "now indictable" and not "already barred" language was maintained:

> *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency

> thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This section shall apply to acts, offenses, or transactions where the existing statute of limitations had not yet fully run on November 17, 1921; but the proviso shall not apply to acts, offenses, or transactions which on that date were already barred by the provisions of existing laws.

18 U.S.C. § 582 (1925-26).

Since the war had ended, Congress employed retroactive language to extend the limitations period for crimes already committed. Mindful of the due process concerns attendant to such retroactivity, the House Judiciary Committee sought advice from the Solicitor General, whose response is quoted at length in and substantially comprises the committee's report. H.R. REP. NO. 67-365, at 2 (1921). The Solicitor General assured Congress that as long as a defendant is "still liable to prosecution" at the time of the extension (*i.e.*, as long as "the statute of limitations has not fully run" for past conduct), retroactive extension is permissible. *Id.* The Solicitor General further advised that "[i]n drafting statutes on the above subject, care should be taken that the amendatory statute should be clearly made to apply to offenses already committed, for, in the absence of such clear intendment, there is a tendency on the part of the courts to hold that the amendatory statutes are prospective and that it was not the legislative intent to make them apply to

crimes already committed." *Id.* The committee adopted this advice in its report. *Id.*

The 1921 act also conforms to this advice. The "now indictable" language reflects clear application "to offenses already committed." *Compare* H.R. REP. NO. 67-365, at 1-2 (1921) ***with*** Act of Nov. 17, 1921, ch. 124, 42 Stat. 220; *cf. McElvain*, 272 U.S. at 637 ("[T]he [1921] proviso was made applicable to offenses theretofore committed and not already barred.").

Six years and one month after enactment, the House Judiciary Committee issued a report concerning repeal of the extension. H.R. REP. NO. 70-16 (1927). The report reiterated that the 1921 act had been passed at the behest of the Attorney General, who had "represented that he was desirous of having further time to investigate alleged war frauds" lest the statute of limitations "run before it would be possible to obtain indictments." *Id.* at 1. Given that "the whole period of six years has now run against all offenses" indictable at the time of enactment, the committee concluded that "[t]he reasons for the [extension] have ceased to exist." *Id.* The report reflects that the Attorney General agreed, *id.* at 2, and Congress eliminated the extension, Act of Dec. 27, 1927, ch. 6, 45 Stat. 51.

This repeal had the effect of "restor[ing] the statute of limitations as it was prior to 1921," H.R. REP. NO. 70-16, at 1 (1927), including removal of the "now indictable" language, Act of Dec. 27, 1927, ch. 6, 45 Stat. 51. The use of the "now indictable" language for the first time in 1921 – applying the

1921 extension to crimes already committed at the time of enactment – was the first (and only) time this term had appeared in the general statute of limitations for non-capital crimes. *See* Rev. Stat. § 1044 (1878); *see also* 18 U.S.C. § 3282 (2012).[5]

C. The 1942 Version Of The WSLA Applied Only To Crimes That Already Had Occurred

In 1941, a House subcommittee held hearings on H.R. 4916, 77th Cong. (1st Sess. 1941), captioned as a bill to suspend "during time of war or national emergency the running of any statute of limitations on prosecutions for Federal offenses." *Suspending Statutes of Limitations During War or Emergency: Hearing on H.R. 4916 Before Subcomm. of the H. Comm. on the Judiciary*, 77th Cong. 1 (1941). This bill would have applied to any "offense punishable under the laws of the United States" and served as permanent policy rather than a one-time

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[5] The brief appearance of "now indictable under any existing statutes" from 1921 to 1927 was a one-time, retroactive extension of the limitations period for qualifying crimes committed prior to enactment. When Congress extended the general three-year limitations period for non-capital crimes to five years in 1954, the extension was effective both prospectively and retrospectively. Act of Sept. 1, 1954, ch. 1214, § 10(b), 68 Stat. 1142, 1145. That extension's retrospective language ("offenses * * * committed prior to [enactment], if on such date prosecution therefor is not barred by provisions of law in effect prior to such date," *id.*) parallels the language of the 1921 extension ("offenses * * * now indictable under any existing statutes," Act of Nov. 17, 1921, ch. 124, 42 Stat 220). This reinforces the view that "now indictable" in 1921 merely served to specify that the act was retrospective.

exception. *Id.* It contained no language limiting it to offenses "now indictable," and it was formulated to apply to future wars or emergencies as well. *Id.* Indeed, the United States was not yet at war: The subcommittee held its hearing on November 26, 1941. *Id.*

During the hearing, a Justice Department official testified that there was no "valid ground" for suspending "statutes of limitation on all crimes" and recommended that suspension be limited to "one type of crime," namely "frauds against the Government." *Id.* at 6 (statement of Special Assist. to the Att'y Gen.). He also recommended that a suspension be structured with "some time limit" (*i.e.*, for "some period of time") to avoid suspending the limitations period "indefinitely." *Id.* He added that "it would be very desirable if a bill such as was passed in 1921 were enacted at this time." *Id.* Likewise, in a letter included in the hearing report, the Attorney General stated that the Justice Department was "unable to recommend the enactment of the bill in its present form" since there was no apparent basis for "extension of the statute of limitations in criminal cases other than those involving frauds against the United States." *Id.* at 8.

In Congress's next session, the House Judiciary Committee addressed a new bill, H.R. 6484, 77th Cong. (2d Sess. 1942), intended to suspend the limitations period for "offenses involving the defrauding or attempts to defraud the United States or any agency thereof," H.R. REP. NO. 77-2051, at 1 (1942). The committee's report observed that the United States once again was "engaged in a gigantic

war program" like the one that had necessitated an extension of the "criminal statute of limitations" in 1921. *Id.* The committee quoted favorably from its own 1921 report, which reasoned that, in the aftermath of World War I, the government had needed more time to determine "whether prosecutions are justified or not." *Id.* at 2 (quoting H.R. REP NO. 67-365, at 1-2 (1921)) (internal quotation marks omitted). The committee's 1942 report concluded that enactment would allow the busy government "sufficient time to investigate, discover, and gather evidence to prosecute frauds." H.R. REP. NO. 77-2051, at 2 (1942). The report also asserted that this bill had been "cleared with the Legislative Committee of the Department of Justice." *Id.*

During House floor debate, Rep. Rankin was the only Member to speak. 88 CONG. REC. 4759 (1942). She spoke favorably of the general principles behind suspension, emphasizing that the ordinary "3-year period * * * to investigate, discover, and gather evidence to prosecute Federal offenses" was not "adequate" given the scope of the war program and that "[t]he law-enforcing agencies of the Government" were occupied beyond their "normal functions of law enforcement." *Id.* She concluded that "evidence sufficient to indict may not be unearthed until considerably later." *Id.* She supported the bill, but emphasized that she favored H.R. 4916, which would have "stop[ped] the running of the statute of limitations on crimes already committed" for *all* federal crimes and urged Congress to support that approach. *Id.* at 4759-60.

Despite Rep. Rankin's preference for the more expansive H.R. 4916, the House passed the less-inclusive version (specific to fraud crimes, as embodied in H.R. 6484) immediately after debate. *Id.* at 4760. As passed, the House bill provided that "offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended for the period of the present war and for 6 months thereafter." *Id.* at 4759. The bill then moved to the Senate, where the Senate Committee on the Judiciary recommended the bill with amendments. S. REP. NO. 77-1544 (1942).

The Senate committee's report was identical in most respects to that of the House committee, explaining that the government needed more time to investigate and "prosecute frauds," *id.* at 2, and recounting the 1921 extension of the "criminal statute of limitations" to prevent offenses from being "barred from prosecution," *id.* at 1-2. The committee's amendments were telling. The House bill only partially addressed the Justice Department's 1941 concerns – the bill was limited to frauds against the government, but it was still without a time limit other than the end of war. The House bill also was somewhat inconsistent in that it provided for an open-ended, forward-looking extension while retaining the retrospective language from the 1921 act that limited the bill to offenses "now indictable," making it temporary in some respects and permanent in others.

The Senate committee's amendments made the bill internally consistent, in part by replacing the "present war and for six months thereafter" standard with a fixed date, "June 30, 1945." S. REP. NO. 77-1544, at 1 (1942). The bill was then formally re-titled as a bill to "suspend temporarily the running of statutes of limitations applicable to certain offenses." 88 CONG. REC. 6161 (1942); 88 CONG. REC. 6874 (1942). By contrast, the bill had been introduced and had first passed the House not as a "temporar[]y" bill with a fixed end-date but rather as an open-ended bill tied to the unknown length of "the present war." 88 CONG. REC. 821 (1942); 88 CONG. REC. 4759 (1942).

The amended bill passed the Senate, 88 CONG. REC. 6161 (1942), and the House adopted it by unanimous consent, 88 CONG. REC. 6874 (1942). As codified the next year in a new section of Title 18, the 1942 act provided:

> The running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or

> transactions which are already barred by the provisions of existing laws.

18 U.S.C. § 590a (Supp. III 1943) (codifying Act of Aug. 24, 1942, ch. 555, 56 Stat. 747).

The 1942 suspension borrowed its operative language from the 1921 extension. Indeed, this Court has recognized that the 1942 act was "substantially the same" as the 1921 act:

> [The 1942 act] was a wartime measure reviving for World War II substantially the same exception to the general statute of limitations which, from 1921 to 1927, had been directed at the war frauds of World War I. * * * In 1942, the reports and proceedings demonstrate a like purpose, coupled with a design to readopt the World War I policy.

Bridges, 346 U.S. at 217-18 (footnotes omitted) (citation omitted); *see also id.* at 221 (noting the "substantial reenactment, in 1942," of the earlier act). Like the 1921 extension, and for the same reasons, the 1942 suspension was retrospective and thus only applicable to offenses that were "now indictable under any existing statutes."[6]

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[6] Unlike the 1921 extension, the 1942 suspension was enacted as a stand-alone provision rather than as an exception embedded in the ordinary statute of limitations, which continued in the United States Code as it had since its 1940 codification. 18 U.S.C. § 582 (1946).

D. The Legislative History Of The 1944 WSLA Amendments Also Supports A Criminal-Only Application

As World War II continued, Congress passed two amendments in 1944 that made the temporary 1942 act more permanent by inserting a "present war" standard, this time at the Justice Department's suggestion. The amendments also brought more crimes within the ambit of the suspension.

The first 1944 amendment – never codified due to its short life – expanded the limitations suspension to include certain crimes associated with war-related government contracting, whether or not amounting to fraud (second clause below), and resulted in the following provision:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after

> the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

Contract Settlement Act of 1944, ch. 358, § 19(b), 58 Stat. 649, 667.

Although this amendment modified the suspension language, it was not the central focus of the Contract Settlement Act, which served primarily to establish an efficient system for compensating contractors when the government terminated war contracts. *Id.* § 1. The legislative record reflects that section 19, which included the revised suspension, was "prepared by the Department of Justice." 90 CONG. REC. 3907 (1944). A substantive criminal provision regarding destruction or failure to maintain war contract records was the centerpiece of section 19. *See* 90 CONG. REC. 1582-83 (1944) (setting forth the proposed section 19); S. REP. NO. 78-836, at 5 (1944) (explaining that these provisions "assure the expeditious prosecution of willful frauds on the part of war contractors in connection with contract settlements" by "mak[ing] it unlawful for war contractors to destroy records"). One of the act's stated purposes was to "prevent improper payments and to detect and prosecute fraud." Contract Settlement Act § 1. This referred, in part at least, to hotly-debated provisions for administrative review of

negotiated settlement agreements for fraud in the inducement, *id.* § 16, and appears likely to also have referred to substantive prohibitions on making false statements during war contract settlement negotiations with the government, *id.* § 19(c)-(d).

Given that the suspension would expire the next year, Congress took the opportunity of this amendment to extend the suspension in a forward-looking manner linked to the end of "the present war." In so doing, Congress dropped the retrospective "now indictable under any existing statutes" language. While the legislative record itself sheds little light on Congress's purpose for the particular wording changes to the suspension provision, it nonetheless makes clear that legislators continued to regard the suspension provision as exclusively criminal in spite of the removal of the "now indictable" language. For example, during House debate, Rep. Sumners discussed a "special department [in the Justice Department] to prosecute war frauds" that had been established at his suggestion and noted that the WSLA would serve to "extend[] the statute of limitation as to these war frauds so that those guilty of such fraud would not escape because of the confusion incident to the war." 90 CONG. REC. 6110-11 (1944).[7]

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[7] The placement of the revised limitations suspension also is telling. Section 19 is captioned "Preservation of Records; Prosecution of Fraud." Contract Settlement Act § 19. The limitations provision itself appeared as section 19(b). Section 19(a), the newly-created *criminal* provision regarding war contract records, thus immediately preceded the wartime suspension of limitations provision.

The second 1944 amendment expanded the limitations suspension to include crimes related to the handling of surplus property. Surplus Property Act of 1944, ch. 479, § 28, 58 Stat. 765, 781. As with the Contract Settlement Act, amending the suspension was not the primary purpose of the Surplus Property Act, which served primarily to establish a comprehensive system for disposition of surplus property. *See* Surplus Property Act § 2. A committee report explained that, "[a]s was provided in the Contract Settlement Act," the Surplus Property Act expanded the suspension of limitations to include "offense[s] against the laws of the United States arising in connection with activities" under the new act "until 3 years after termination of hostilities in the present war." S. REP. NO. 78-1057, at 14 (1944). The same report repeated familiar reasons for suspension, namely the "magnitude of the operations" and the "intensive preoccupation of both participants and witnesses with the war effort" with the result that offenses would "not be apprehended or investigated until the end of the war." *Id.*

E. If Congress Had Intended To Expand The WSLA To Civil Liability, It Would Have Done So Directly, As It Did In Contemporaneous Legislation

As a result of these two 1944 amendments, the words "now indictable under any existing statutes" no longer appeared in the WSLA to modify "offenses." *Compare* 18 U.S.C. § 590a (Supp. III 1943) *with* 18 U.S.C. § 590a (Supp. IV 1945). There is no support in the legislative history for the

proposition that this omission – either by design or effect – expanded the WSLA to include civil claims.

In fact, when Congress intended for a wartime suspension of limitations to apply to civil claims in addition to criminal offenses, it knew what language to use. Only two months after Congress enacted the August 1942 act relating to fraud offenses, Congress enacted an analogous statute for antitrust violations. Act of Oct. 10, 1942, ch. 589, 56 Stat. 781. That antitrust provision expressly applied to "violations," including criminal offenses and civil claims, via use of the "subject to civil proceedings" phrase:

> [T]he running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate.

Id. The antitrust bill fell within the purview of the same Congressional committees that had reported on the 1942 fraud bill – namely each chamber's Judiciary Committee – and, while considering the antitrust bill, these committees expressly referred to the earlier fraud bill, noting that the language in the new antitrust bill had been adapted to reach "violations * * * both civil and criminal." S. REP. NO. 77-1592, at 1 (1942); H.R. REP. NO. 77-2480, at 1 (1942).

Much like the 1942 act relating to fraud against the government, the 1942 antitrust act was a temporary measure: It was linked to a fixed date (June 30, 1945), and it was applicable to offenses "now" actionable under "existing statutes." Act of Oct. 10, 1942, ch. 589, 56 Stat. 781. The Senate committee explained that the date in the antitrust bill was "selected because it is 6 months after December 31, 1944, which has been used by the Congress as an estimated date of the termination of the war and it is felt that the suspension should continue 6 months after the termination of the war." S. REP. NO. 77-1592, at 1 (1942); *accord* H.R. REP. NO. 77-2480, at 1 (1942). Unlike the WSLA of 1942, the antitrust suspension never was amended to a permanent form. *See* 15 U.S.C. § 16 note (1946).

Under these circumstances, there is no room for argument that Congress's 1944 amendments to the WSLA – which continued to refer to an "offense" and contained no reference to civil proceedings – were designed to allow a wholesale expansion of the WSLA's reach. The words used by Congress to reach civil violations in the contemporaneously-enacted antitrust provision preclude any conclusion that Congress changed the statute's meaning indirectly through deletion of the words "now indictable." Indeed, Congress would not have continued to use the word "offense" if it had intended to expand the WSLA's application to civil frauds, since the meaning of the word "offense" in 1944 remained decidedly criminal. *Black's Law Dictionary* 1232 (4th ed. 1951) ("[a] crime or misdemeanor; a breach of the criminal laws"); *Black's Law Dictionary* 1282 (3d ed. 1933) (same).

It also is telling that, ten years later, this Court discerned no such expansion of the WSLA when it described the post-amendment WSLA as having "its origin in the Act of August 24, 1942," while dispensing with the 1944 amendments in a footnote stating that the 1942 act "was amended in 1944 by the insertion of more specific references to war contracts and to the handling of property." *Bridges*, 346 U.S. at 217 & n.15; *see also United States v. Smith*, 342 U.S. 225, 228-29 (1952) (reasoning, after the 1944 amendments, that the act targeted "crimes of fraud perpetrated against the United States," and analyzing the purpose of the act in terms of "law-enforcement officers").

This legislative history demonstrates that introduction of the phrase "now indictable under any existing statutes" in 1942 (or 1921) related to the amendment's retroactivity. The act already was limited to criminal offenses through the use of the word "offense," which had appeared without exception in the general statute of limitations for non-capital crimes since 1790. *See* Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119. Congress repealed the 1921 extension in 1927, returning the statute of limitations to roughly its pre-1921 state without the "now indictable" language. *Compare* 18 U.S.C. § 582 (1934) *with* Rev. Stat. § 1044 (1878); *see also* 18 U.S.C. § 582 (1925-26). Thus, removal of the phrase "now indictable under any existing statutes" in 1944 (or 1927) did not tacitly expand "offense" to include a civil claim.

F. Codification Within Title 18 In 1948 Confirmed The WSLA's Criminal-Only Application

After the 1944 amendments, the WSLA remained unchanged until 1948, when, as part of a Title 18 overhaul, former 18 U.S.C. § 590a (1946) became 18 U.S.C. § 3287 (Supp. II 1949), and Congress added new language making the provision applicable to future wars. This re-codification, enacted on June 25, 1948, became effective on September 1, 1948, and remained in force for 60 years, providing:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed

> by the President or by a concurrent resolution of Congress.
>
> Definitions of terms in section 103 of title 41 shall apply to similar terms used in this section.

18 U.S.C. § 3287 (1952) (codifying Act of June 25, 1948, ch. 645, sec. 1, § 3287, 62 Stat. 683, 828 (effective Sept. 1, 1948, 62 Stat. 862)).

This re-codification continued the use of the term "offense" along the unbroken chain of criminal meaning assigned to this term when the 1921 act was passed, Rev. Stat. §§ 1043-44 (1878) (treating offenses as "capital" and "not capital"); Act of Mar. 4, 1909, ch. 321, § 335, 35 Stat. 1088, 1152 (classifying certain offenses as "[f]elonies" while providing that "[a]ll other offenses shall be deemed misdemeanors"), when the 1942 and 1944 acts were passed, 18 U.S.C. § 541 (1940) (classifying certain offenses as "[f]elonies" while "[a]ll other offenses shall be deemed misdemeanors" and "petty offenses"); 18 U.S.C. §§ 581, 581a, 581b, 582 (1940) (treating offenses as punishable by death and "not capital"), and when the re-codification took place, 18 U.S.C. § 1 (1952) (classifying all offenses as "felony" or "misdemeanor," some of the latter of which are further classified as "petty offense[s]"); 18 U.S.C. §§ 3281-82 (1952) (treating offenses as "[c]apital" and "not capital"). The continued placement of the WSLA in the criminal code with these definitions is highly probative of Congress's intent to use "offense" to mean "crime."

The Solicitor General's brief opposing grant of *certiorari* in this case concedes the validity of such reasoning when discussing the meaning of "offense" in the federal conspiracy statute: "Congress's use of the term 'misdemeanor' to describe less serious 'offense[s]' suggests that Congress used the term 'offense' * * * to mean 'crime.'" Brief for the United States as *Amicus Curiae* at 10 n.3, *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, No. 12-1497 (May 27, 2014); *cf.* 18 U.S.C. § 541 (1940); 18 U.S.C. § 1 (1952). The United States was even more cognizant of this context in 1959 when it told this Court that the WSLA only applied to "criminal violations" and that there was "no suspension of limitations on civil actions." Brief for the United States at 9, *Koller v. United States*, 359 U.S. 309 (1959) (No. 362). Indeed, in 1959, the felony-misdemeanor dichotomy still was codified saliently as the first section of Title 18. 18 U.S.C. § 1 (1958) (titled "Offenses classified" and providing that every offense is a "felony" or "misdemeanor").[8]

G. The Legislative History Of The 2008 WSLA Amendments Further Supports Limiting The WSLA To Crimes

After 60 years with the WSLA in its 1948 form, Congress amended the provision in September 2008, expanding its application to instances in which there has been a Congressional "authorization for the use of the Armed Forces" – as opposed to a formal war

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[8] This provision is no longer in effect, having been repealed in 1984 as part of enabling legislation for the Federal Sentencing Guidelines. *See* 18 U.S.C. § 1 note (2012).

declaration – and adding language lengthening the after-hostilities suspension period from three years to five years. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, § 8117, 122 Stat. 3574, 3647 (2008).[9]

The lengthening of the suspension period from three to five years is particularly significant because the new period coincided with the modern statute of limitations for federal non-capital crimes, 18 U.S.C. § 3282 (2012), just as the three-year period specified in the previous version of the WSLA had coincided with the three-year statute of limitations then in effect, *compare* 18 U.S.C. § 582 (1946) *with* 18 U.S.C. § 590a (1946). The parallel was considered purposeful in 1946. *See Smith*, 342 U.S. at 229 ("That seems to us to be an alteration in the statutory scheme, one that destroys its symmetry. Since under our construction the three-year period prescribed by the Suspension Act starts to run at the date of termination of hostilities, all crimes to which the Act is applicable are treated uniformly."). In fact, the Senate Judiciary Committee's report on the 2008 amendments (as a stand-alone bill, before consolidation into an appropriations act) emphasized that this extension was to "mak[e] the law consistent with the current statute of limitations for criminal fraud offenses." S. REP. NO. 110-431, at 2 (2008).

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[9] Notwithstanding a duplicative and apparently inadvertent amendment enacted later in 2008, which was retroactively repealed in 2009, this version remains current. 18 U.S.C. § 3287 (2012).

The committee's 2008 report stated that the 1942 act had "extended the time prosecutors had to bring charges relating to criminal fraud offenses against the United States," *id.*, and made no mention of any subsequent expansion to include civil claims. The committee report assumed throughout – using decidedly criminal terms – that the WSLA applies specifically to crimes. *See, e.g.*, *id.* at 4 ("statute of limitations for criminal fraud offenses"); *id.* ("statute of limitations * * * to bar criminal actions in investigations of contracting fraud"); *id.* ("grant of immunity for fraudulent conduct by war contractors that has gone undiscovered or unprosecuted"); *id.* at 5 ("standard statute of limitations for all criminal fraud provisions"); *id.* at 7 ("should be vigorously prosecuted"); *id.* ("as soon as a crime has been committed"); *id.* ("prosecution for most federal crimes must begin within five years of the commission of an offense"); *id.* ("liability for criminal offenses"); *id.* at 8 ("statute of limitations for a criminal offense").

There is no indication in the statute's text or any 2008 legislative history that Congress intended to expand the WSLA to apply to civil claims or that it ratified any prior civil application. This most recent history is fully consistent with how the WSLA always has been viewed by Congress – as an extension of *criminal* statutes of limitations.

II. THE CIVIL FCA DOES NOT SATISFY THIS COURT'S WSLA TEST

Even assuming that the WSLA, despite its history and purpose as an exception to criminal statutes of limitations, could be read to apply to

certain civil statutes, it should not apply to the modern-day civil FCA. Because Congress lowered the scienter threshold for civil FCA liability in 1986, the FCA does not satisfy this Court's longstanding requirement that fraud must be "an essential ingredient" of any offense subject to the WSLA.

In two criminal cases decided the same day in 1953, this Court, relying on earlier decisions interpreting the WSLA's predecessor, addressed the application of the WSLA to criminal offenses for which the statute of limitations had otherwise run. *See Grainger*, 346 U.S. at 242 & n.13; *Bridges*, 346 U.S. at 221. The earlier decisions limited the extended statute of limitations to crimes "in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." *United States v. Noveck*, 271 U.S. 201, 203-04 (1926) ("[T]he alleged purpose to defraud the United States is not an element of the crime defined in [the statute] on which the indictment is based."); *see also McElvain*, 272 U.S. at 638-39 (rejecting the government's argument that defrauding the United States was "an ingredient of the crime charged"); *cf. Scharton*, 285 U.S. at 521-22 (holding in tax evasion case under an analogous revenue provision that, unless the "intent to defraud" was "an element of a specified offense," the extended statute of limitations did not apply).

In *Bridges*, the Court held that "[t]he purpose of the Wartime Suspension of Limitations Act is * * * to suspend the running of [the statute of limitations] only where *fraud* against the Government is *an essential ingredient of the crime*." 346 U.S. at 222

(emphasis added). Applying that "essential ingredient" standard to the criminal offense of making a false statement in a naturalization proceeding, the Court held that the WSLA did not suspend the statute of limitations because, "although fraud often accompanies" a false statement, that "offense is complete without proof of fraud." *Id.*

In *Grainger*, the Court applied the same "essential ingredient" test to criminal charges that the defendants had "present[ed] * * * for payment or approval, to [the Government], any claim upon or against the Government * * * knowing such claim to be false, fictitious, or fraudulent" and had conspired to make false claims. 346 U.S. at 238, 241-43. Applying the WSLA to this crime, the *Grainger* Court explained: "The statement of the offenses here carries with it the charge of inducing or attempting to induce the payment of a claim for money or property involving *the element of deceit that is an earmark of fraud*." *Id.* at 243 (emphasis added).

The Court has not reexamined the "essential ingredient" test since *Bridges* and *Grainger*, but it remains applicable today. That test mandates that the statute at issue include fraud as a core element, with the offender acting with the level of scienter typically associated with criminal fraud. The modern FCA falls outside of the WSLA's reach under the "essential ingredient" test because, while FCA violations bear the indicia of fraud, Congress expressly eliminated any requirement that FCA liability be predicated on a specific intent to defraud.

In 1986, Congress amended the civil FCA by lowering the threshold showing of intent previously required under the pre-amendment FCA and extending liability to those persons who "ignore 'red flags' that the information may not be accurate or those persons who deliberately choose to remain ignorant of the process through which their company handles a claim." H.R. REP. NO. 99-660, at 21 (1986). One rationale for this amendment was the Senate's view that the stricter "actual knowledge of fraud" and specific intent to defraud standards "presently prohibit[] the filing of many civil actions to recover taxpayer funds lost to fraud." S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276.

The Justice Department supported the changes to the intent standard: "[W]e do not think that we should have to prove a criminal standard of specific intent to defraud the Government. That is the kind of standard which is associated with criminal penalties, rather than civil penalties * * *." *Legislation to Combat the Growth of Fraud Against the Federal Government Through the Filing of False Claims by Government Contractors Before the S. Comm. on the Judiciary*, 99th Cong. 3 (1986) (statement of Richard K. Willard, Assist. Att'y Gen., Civ. Div., Dept. of Justice).

As enacted, the 1986 amendments provide a new definition of "knowing" that includes intentional fraud as well as "deliberate ignorance of the truth or falsity of the information" and "reckless disregard of the truth or falsity of the information." *See* 31 U.S.C. § 3729(b)(1) (2012). Since 1986, the civil FCA affirmatively has stated that "no proof of specific

intent to defraud" is required to prove knowledge under the statute. *Id.*; *see also United States v. TDC Mgmt. Corp.*, 24 F.3d 292, 296 (D.C. Cir. 1994) ("[T]he government need not prove that [the defendant] had *an intent to deceive* when it knowingly or recklessly made false statements to the government." (emphasis added)).[10]

In *Bridges*, the Court rejected the government's argument that "proof of a specific intent to defraud is an essential ingredient of the offense." 346 U.S. at 223-24. In so doing, the Court focused on "the statute creating the offense": "It is the statutory definition of the offense that determines whether or not the statute of limitations comes within the Suspension Act." *Id.* at 222-23. Lower courts deciding whether the WSLA applies to the post-1986 civil FCA have reached differing conclusions.

In *United States v. Wells Fargo Bank, N.A.*, the district court did not properly account for the civil FCA's statutory definition when applying the WSLA to a civil FCA action. *See* 972 F. Supp. 2d 593, 611-12 (S.D.N.Y. 2013). Instead, the court conflated

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[10] Notwithstanding the statute's affirmation that no specific intent to defraud is required to establish FCA liability, courts properly continue to require that FCA complaint allegations bearing fraud indicia must be pled with particularity in accordance with Rule 9(b) of the Federal Rules of Civil Procedure. *See, e.g.*, *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1477 (2d Cir. 1995) (holding that the reduced intent requirement does not conflict with the pleading requirement, since "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally" under Rule 9(b) (quoting Fed. R. Civ. P. 9(b)) (internal quotation marks omitted)).

the criminal False Claims Act standard for "knowing" – as analyzed in *Grainger* – and the statutorily defined standard for "knowing" under the post-1986 civil FCA. *Id.* However, the criminal False Claims Act has no comparable statutory definition imposing criminal liability based on a "reckless disregard" scienter standard. *See* 18 U.S.C. § 287 (2012). In contrast, Congress specifically defined a lower intent threshold in the civil FCA and wrote into the statute that "'knowing' and 'knowingly' * * * require no proof of specific intent to defraud." 31 U.S.C. § 3729 (b)(1) (2012).[11]

In *Landis*, D.C. Circuit Judge Robert L. Wilkins (sitting by designation) properly rejected the WSLA's application to the FCA. 2014 U.S. Dist. LEXIS 83313, at *67-72. Citing the civil FCA's history, the court reasoned "that civil FCA actions under the modern version of the statute do not require proof of fraud as an 'essential element,' which is required by the holdings in *Bridges* and *Grainger* for the WSLA to apply." *Id.* at *68-71. Judge Wilkins described as "rather unilluminating" the district court's decision

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[11] Moreover, courts have found that the elements of criminal false claims include "the specific intent to violate the law or * * * a consciousness that what he was doing was wrong." *United States v. Slocum*, 708 F.2d 587, 596 (11th Cir. 1983) (citation omitted) (internal quotation marks omitted). For example, in *United States v. Maher*, the Fourth Circuit approved a jury instruction stating that, under the criminal false claims statute, criminal intent "could be proved by either a showing that the defendant was aware he was doing something wrong or that he acted with a specific intent to violate the law." 582 F.2d 842, 847 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

in *United States ex rel. McCans v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), *aff'd per curiam*, 254 F.2d 90 (D.C. Cir. 1958) (affirming without discussion of the WSLA), a 1950s-era case applying the WSLA to the 1948 version of the civil FCA, because the *McCans* court did not discuss *Grainger* and the specific intent requirement, and "its 'holding' that the WSLA applied to a civil FCA case was actually dictum." *Landis*, 2014 U.S. Dist. LEXIS 83313, at *71 n.27. Judge Wilkins also minimized the import of the Fourth Circuit's decision in the present case, since that court never addressed *Grainger*'s "specific intent to defraud" requirement. *Id.*[12]

Even assuming that some civil violations fall within the WSLA's ambit, the civil FCA cannot be one of them since it cannot satisfy this Court's requirement that the WSLA's application be limited to those offenses with intentional "fraud" as an essential ingredient.

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[12] There is no valid argument that Congress essentially ratified application of the WSLA to the modern-day civil FCA through the 2008 amendments to the WSLA since no court had applied the WSLA to the post-1986 civil FCA prior to the 2008 WSLA amendments.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

KELLOGG BROWN & ROOT, INC., *et al.*,

Petitioners,

v.

UNITED STATES EX REL. BENJAMIN CARTER,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF THE AMICUS CURIAE[1]

The National Whistleblower Center ("NWC") is a nonprofit, non-partisan, tax-exempt, organization dedicated to the protection of employees who report misconduct. The NWC is keenly aware of the issues facing employees who seek to report fraud and misconduct, *see e.g.* www.whistleblowers.org. The NWC's directors have authored seven books on whistleblower law.

As part of its core mission, the Center monitors major legal developments, and files amicus briefs in order to assist courts in understanding complex issues raised in many whistleblower cases, and the important public policies underlying the Congressional intent behind these important anti-fraud laws. Since 1990, the Center has participated before this Court as *amicus curiae* in cases that directly impact the rights of whistleblowers, including, *English v. General Electric,* 496 U.S. 72 (1990); *Haddle v. Garrison,* 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have submitted to the Clerk blanket consents to the filing of all *amicus* briefs. Pursuant to this Court's Rule 37.6, *Amicus* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

529 U.S. 765 (2000); *Beck v.* Prupis, 529 U.S. 494 (2000); EEOC *v. Waffle House, Inc.*, 534 U.S. 279 (2002), and *Doe v. Chao,* 540 U.S. 614 (2004); *Lawson v. FMR LLC*, 134 S. Ct 1158 (2014); *Lane v. Franks*, 134 S. Ct. 2369 (2014).

Persons assisted by the Center have a direct interest in the outcome of this case. The False Claims Act is the government's "most important tool to uncover and punish fraud against the United States." U.S. Chamber, Institute for Legal Reform, "Fixing the False Claims Act," p. 1 (October 2013). The key enforcement mechanism in the False Claims Act is its reliance upon "insiders" or whistleblowers to provide credible information documenting fraud against the U.S. government. Numerous whistleblowers assisted by the Center have used the False Claims Act to effectively provide information to the government in order to protect the public fisc and hold fraudsters accountable.

SUMMARY OF THE ARGUMENT

Even the harshest critics of the False Claims Act (FCA or Act) are forced to admit that the Act is the government's "most important tool to uncover and punish fraud against the United States." U.S. Chamber, Institute for Legal Reform, "Fixing the False Claims Act," p. 1 (October 2013) ("Chamber Report"). At the very "heart" of the Act's effectiveness are the *qui tam* provisions which require would-be whistleblowers to make disclosures to the Attorney General

concerning fraud against the United States and to file civil lawsuits to hold the fraudsters accountable.[2] Based upon these facts, as the Senate Judiciary Committee unanimously noted in its comprehensive 2008 review of the history and impact of the law, "the need for a robust FCA cannot be understated."[3]

It is imperative that this Court give full effect to the law's explicit language, which is consistent with the clear intent of Congress. Fraud against the government is widespread, and has a devastating impact on the credibility of the government, the integrity of programs designed to serve the public interest and the long-term fiscal soundness of the public treasury. Although the amount of fraud for which the government (and taxpayers) suffers from each year is difficult to detect, the U.S. Chamber's Institute for Legal Reform (an affiliate of the U.S. Chamber of Commerce) estimates that "the United States Treasury loses approximately $72 billion to fraud, abuse and improper payments each year." Chamber Report, p. 1.

Whistleblowers are the single most important source of information concerning fraud against the government, and their contributions through the filing of FCA cases have constituted the basis for approximately 80% of all civil fraud

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[2] Committee on the Judiciary, "The False Claims Act Corrections Act of 2008, Senate Report 110-507, p. 1 (September 17, 2008).

[3] *Id.*, p. 6.

recoveries. The record demonstrates that FCA lawsuits, filed by whistleblowers, have been phenomenally successful, and that the unsubstantiated allegations of frivolity consistently raised by the Petitioners and some of the *amici* are without any basis in fact.

After nearly 30-years of litigation under the Act it is now uncontested that whistleblowers are the primary source of information regarding government fraud, and their active role in these cases is what makes the FCA the government's "most important tool to uncover and punish fraud against the United States." Chamber Report, p. 1.

There is no legal support, either in the text of the statute or in its legislative history, for the legal arguments raised by the Petitioners regarding the scope of the "first-to-file" claim bar. The Chamber of Commerce's concerns that upholding the Fourth Circuit's decision would promote frivolous complaints is not supported by objective empirical data, and is counter to common sense. A broad reading of the "first-to-file" bar would encourage plaintiffs to file overly broad, ill-conceived complaints simply to ensure their eligibility for a reward. It would place a premium on form over essence, clog the system with weaker claims, and reward plaintiffs who file overly broad claims, regardless of the substance of their information. Petitioners' argument would have a devastating impact on the primary purpose of the law: encouraging the

filing of high-quality fraud complaints that meet the strict pleading standards that are implicit and explicit in the statute.

ARGUMENT

I. WHISTLEBLOWER DISCLOSURES UNDER THE FCA ARE THE BACKBONE OF THE UNITED STATES' ANTI-FRAUD PROGRAM AND WOULD BE UNDERMINED IF THE DECISION OF THE FOURTH CIRCUIT WERE REVERSED

The *qui tam* whistleblower provisions of the FCA have been remarkably successful. They constitute the backbone of the United States' anti-fraud program. Even the FCA's most aggressive critic, the U.S. Chamber of Commerce's Institute for Legal Reform, conceded, "*the False Claims Act is the government's most important tool to uncover and punish fraud against the United States.*" Chamber Report, p. 1. Similarly, the officials from the U.S. Department of Justice repeatedly echoed this same sentiment: *"[I]t is abundantly clear that, twenty-five years after this statute* [the whistleblower reward law] *was significantly amended, it remains the government's most potent civil weapon in addressing fraud against the taxpayers."* [4]

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[4] Acting Assistant Attorney, Civil Division DOJ (Statement before the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement, June 7, 2012) (emphasis added).

Whistleblowers are the single largest source of all FCA recoveries.[5] The key to the success of the Act is the ability of the *qui tam* provisions to incentivize employee disclosures: "*The increased incentives for whistleblowers have led to an unprecedented number of investigations and greater recoveries The whistleblowers who bring wrongdoing to the government's attention are instrumental in preserving the integrity of government programs and protecting taxpayers the costs of fraud.*"[6]

The "impact" of the *qui tam* whistleblower provisions added to the FCA by the 1986 amendments have been "nothing short of profound:"

[T]he False Claims Act has provided

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[5] "The False Claims Act is the government's primary civil remedy to redress false claims for government funds . . . In 1986, Congress strengthened the Act by amending it to increase incentives for whistleblowers to file lawsuits on behalf of the government, which has led to more investigations and greater recoveries. Most false claims actions are filed under the Act's whistleblower, or qui tam, provisions " U.S. Department of Justice, Office of Public Affairs, "Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013," December 20, 2013.

[6] Principal Deputy Assistant Attorney, quoted in Department of Justice, Office of Public Affairs, "Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (December 4, 2012).

> *ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring accountability to those who would take advantage of the United States government – and of American taxpayers. Since the day that President Reagan signed these bipartisan amendments into law in 1986, their impact has been nothing short of profound Some of these [False Claims Act cases] may have saved lives. All of them saved money. And – taken as a whole – this remarkable track record represents a wide-ranging effort to eradicate the scourge of fraud from some of government's most critical programs.*[7]

The "value" of the Act's *qui tam* provisions is not just in recovering money for the taxpayer, but also in deterring fraud and protecting honest federal contractors from unfair competition:

> *[The False Claims Act's whistleblower reward] amendments have played a critical role in transforming the FCA into what it is today – the most powerful tool the American people have to protect the government from fraud . relators* [have] *been central to our record-setting recoveries But the value of the False Claims Act is not just in allowing the government to respond to fraud after it*

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[7] Attorney General Eric Holder Speaks at the 25th Anniversary of the False Claims Act Amendment of 1986 (January 31, 2012)(emphasis added).

> *happens. It is also in preventing fraud from happening in the first place The results have been a tremendous benefit not only to the government and the American public but also to companies that want to do business fairly and honestly, and want to know that they won't be put at a competitive disadvantage as a result because others are not playing by the rules.*[8]

The key role whistleblowers now play in the government's anti-fraud efforts is reflected in the objective statistics published by the Justice Department's Civil Division.[9] Since the 1986 amendments came into effect, whistleblower *qui tam* lawsuits triggered 69.85% of all FCA recoveries. This was $27,201,587,782 of $38,941,590,490 total recoveries. Non-whistleblowers made up 30.15% ($11,740,002,708 of $38,941,590,490) in recoveries for the taxpayers.

This percentage has grown exponentially over time, as more employees have learned of the effectiveness of the Act. From 2009-2013, whistleblowers made up 78.08% of FCA recoveries. This was $13,497,026,294 of

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[8] Assistant Attorney General, U.S. Department of Justice (Remarks at American Bar Association's 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement, June 5, 2014)(emphasis added).

[9] *Fraud Statistics,* U.S. Department of Justice (2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf [hereinafter DOJ Statistics].

$17,285,075,094 total recoveries. Non-whistleblowers made up 21.92% ($3,788,048,800 of $17,285,075,094) of recoveries.

Percentange of FCA Recoveries That Came from Whistleblowers (Qui Tam) v. Non-Whistleblowers (Non-Qui Tam) Between 1987-2013

■ Qui Tam (69.85%)

Non-Qui Tam (30.15%)

The reason why whistleblowers are so effective at reporting fraud was explained in a bi-partisan report issued by the U.S. Senate Judiciary Committee. Quoting University of Alabama Bainbridge Professor of Law, Pamela Bucy, the report stated:

> *Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring Fraud is usually buried in mountains of paper or digital documents. It is hidden within an organization Given these facts, insiders who are wiling to blow the whistle are the only way to effectively*

> *and efficiently piece together what happened and who is responsible.* [10]

Significantly, Professor Bucy, the Justice Department, and the Senate Judiciary Committee's strong support for incentivizing insiders to report fraud were empirically supported by key objective studies. For example, the University of Chicago Booth School of Economics conducted the most comprehensive and objective study of whether whistleblower reward laws work. The study focused on the FCA, and was designed to "identify the most effective mechanisms for detecting corporate fraud." It was based upon an "in-depth" study of "all reported fraud cases in large U.S. companies between 1996 and 2004."[11]

The Booth School's conclusions are clear and speak for themselves:

- *"A strong monetary incentive to blow the whistle does motivate people with information to come forward."*[12]
- *"[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."*[13]

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[10] Committee on the Judiciary, "The False Claims Act Corrections Act of 2008, Senate Report 110-507, pp. 6-7 (quoting from Professor Bucy) (emphasis added).

[11] Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?* University of Chicago, 2006, p. 1.

[12] *Id.*, p. 4.

[13] *Id.*, p. 25.

- *"Monetary incentives seem to work well, without the negative side effects often attributed to them."*[14]

In addition to validating the importance of whistleblower laws such as the FCA, the Booth School study also explained the downside of whistleblowing, and how without laws such as the FCA, fraud will be undetected, and the few whistleblowers who do step forward will not be rewarded:

"[E]mployees clearly have the best access to information," [but whistleblowers were] "fired, quit under duress, or had significantly altered responsibilities. In addition, many employee whistleblowers report having to move to another industry and often to another town to escape personal harassment."

* * *

"Not only is the honest behavior not rewarded by the market, but it is penalized Given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all."[15]

Given the key role the *qui tam* provisions play in the United States' anti-fraud program, this Court must reject the invitation of the Petitioners' to create judicially constructed barriers to fraud reporting. Not only would this

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[14] *Id.*, p. 26.
[15] *Id.*, p. 23.

undermine the public interest, it would be radically at odds with the Congressional intent behind the 1986 amendments to the FCA.

The FCA's "first-to-file" bar is extremely narrow. The bar only covers claims that are closely related or identical to each other, and also only applies to "pending" actions. 31 U.S.C. § 3730(b)(5). This narrow statutory language well serves the Congressional purposes and policies behind this critical anti-fraud law.

II. THE HARSH ATTACK ON RELATORS' CONDUCT IS WITHOUT MERIT

Petitioners and their supporting *amici* have raised unsupported, undocumented and highly speculative arguments deriding whistleblowers. These speculations are not supported by empirical evidence.

The brief filed by the Chamber of Commerce, *et al.* raises a host of meritless and misleading arguments attempting to paint whistleblowers in a negative light. First, they argue "FCA claims are at [an] all time high, with claims being filed in "increasing numbers." Chamber Brief, pp. 4, 13. These claims feed into their unsubstantiated fear that the Fourth Circuit's ruling will invite numerous meritless "serial, duplicative claims." *Id.* p. 23.

Although the number of False Claims Act cases has increased over time, their total number

is miniscule. Only 753 cases were filed in 2013, which represents, on average, a mere eight cases in each of the 94 judicial districts in the United States. *See* DOJ Fraud Statistics.

But the real problem is not the large number of False Claims Act cases, it is the *small number* of such cases. As the Chamber's own Institute for Legal Reform pointed out, although the False Claims Act is the "most important tool to uncover and punish fraud," its reach still fails to capture a majority of fraud committed against the United States, which the Chamber estimated at $72 billion per year. Chamber Report, p. 1.

The reason that the majority of fraud is going undetected has nothing to do with whistleblowers filing "serial" claims. The inability of the government to detect and punish fraud is fuelled by the continuing reluctance of the overwhelming majority of employees to report fraud to the government.

The most thorough empirical studies of this problem were conducted by the corporate-sponsored Ethics Resource Center ("ERC").[16]

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[16] The ERC used Survey Sampling International to collect its data, with a sampling error of +/- 1.4 percent at the 95 percent confidence level. ERC, "2011 National Business Ethics Survey: Workplace in Transition," *www.ethics.org/files/u5/FinalNBES-web.pdf* (Arlington, Va., 2012). The "principal sponsors" of the survey were Walmart Stores, Inc. and Northrop Grumman. Other sponsors included BP, Raytheon, Lockheed Martin, BAE Systems and SAIC, not whistleblower advocacy groups.

Their 2011 survey of workplace culture concluded that "retaliation against employee whistleblowers" had "r[isen] sharply," while at the same time there was an "increase in pressure to compromise their companies standards or polices, or even break the law."[17]

Another ERC report, "Blowing the Whistle on Workplace Misconduct," concluded that close to 40% of all American workers did not disclose fraud or misconduct observed in the workplace to *anyone*. "Blowing the Whistle," p. 2 ("four in ten employees who witnessed workplace misconduct did not typically report it.").[18] Even worse was the failure of employees to report misconduct to law enforcement authorities. Of the 60% of employees willing to report misconduct, the "vast majority" simply made a report to their supervisor or manager. Only 4% of those willing to report relayed their concerns to "someone outside" of the "company." *Id.*, p. 5. Based upon these numbers, the ERC concluded that "boosting" the percentage of employees willing to disclose "wrongdoing" should be an "important goal" for *both* private sector companies and "government enforcement agencies." *Id.*, p. 13.

Thus, in the current corporate culture, 96% of those who initially reported misconduct were

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[17] *Id.*, pp. 12, 18.

[18] Ethics Resource Center, "Blowing the Whistle on Workplace Misconduct," *www.ethics.org/resource/blowing-whistle-workplace-misconduct* (Arlington, Va., December 2010).

unwilling (or simply did not) report the misconduct outside of their company, let alone to federal law enforcement agencies.

The Chamber of Commerce asserted that "there is strong evidence" that "the vast majority of *qui tam* relator suits are meritless." Chamber Brief, p. 15. This is a misleading distortion of the facts. First, they cite to absolutely no "strong evidence" to support this point. They only cite to overall statistics that contain no data whatsoever as to why the Department of Justice declined various lawsuits. See Id.

Second, the record demonstrates that *qui tam* lawsuits filed by whistleblowers are now the cornerstone of the government's anti-fraud enforcement program. It is the *qui tam* whistleblower lawsuits that now constitute nearly 80% of all FCA lawsuits pursued by the Department of Justice. Although the Chamber ridiculed the *qui tam* lawsuits for which the Justice Department declined intervention as resulting in only a "miniscule percentage of total recoveries," it is only common sense that the Justice Department would use its very limited resources in pursing larger cases. Why would the Justice Department prosecute a fraud case for which the underlying recovery would only be $1 million, when they could select a case for which the recovery would be $100 million? In fact, it would be highly irresponsible for the Justice Department to prosecute small cases, at the expense of equally meritorious large cases.

Third, fraud recoveries in non-intervened cases are not "miniscule." As of the end of FY 2013 the total amount of fraud recovered by the United States in declined cases was $991,079,038.00.[19] For the average taxpayer, who is the primary victim of fraud against the government, this amount is not "miniscule."

The Chamber was not able to point to any data that objectively analyzed the merits of the declined False Claims Act cases. However, as explained below, there is a specific provision in the Act that permits companies victimized by vexatious or meritless filings to seek attorney fees from the *qui tam* relators. A review of all of the available cases decided under this provision demonstrates that the numbers of truly meritless and frivolous cases are "miniscule." It appears as if over the entire 30-year history of the amended FCA there have been less then a dozen reported cases decided under the sanctions provision.

Finally, the Chamber alleged that "serial relators have become commonplace." Chamber Brief, p. 24. But this argument confused the concept of a "serial relator" with someone filing serial complaints on a similar issue. The "two dozen" such serial relators (which is a "miniscule" number given the nearly 10,000 False Claims Act complaints filed since the law was amended in 1986) would not have been prohibited from filing

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[19] *Fraud Statistics*, U.S. Department of Justice (2013), p. 2.

their claims under the "first-to-file" rule at issue in this case, as they were not accused of re-filing similar complaints. Moreover, the entire concern that without a broad "first-to-file" rule whistleblowers "would be able to file, dismiss, and re-file identical *qui tam* actions," is nonsensical. There is no evidence that this is a real problem, and it would make no sense whatsoever for a relator to file, dismiss and re-file an identical lawsuit. It would be a waste of time and money for the relator and his or her counsel, and would open up the relator to sanctions pursuant to the reverse attorney fee provision of the False Claims Act discussed below.

The Chamber's entire concern is premised on a distorted view of whistleblowers, harping on derogatory stereotypes with no supporting empirical data. Objective studies of whistleblower behavior demonstrate that this concern is misplaced. A major study published in the *New England Journal of Medicine* found that whistleblowers were motivated by "integrity," "strong ethical standards," concerns over "public health," and, to a far lesser extent, "fears that the fraudulent behavior" made it necessary for the employees to "protect themselves."[20] There is nothing in the *Journal's* study that indicates that any real whistleblower would pose a risk for filing and re-filing meritless lawsuits.

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[20] Kesselheim, et al., "Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies," *New England Journal of Medicine* (May 13, 2010).

III. PETITIONERS' INTERPRETATION OF THE "FIRST-TO-FILE" RULE FLOUTS THE PLAIN LANGUAGE AND INTENT OF THE FCA

Once a person has brought a sufficient FCA action, "no person other than the Government may intervene or bring a related action based on the same facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The Petitioners' far-reaching interpretation of the FCA flouts the plain language and intention of this statute.

The "meaning of a statute must, in the first instance, be sought in the language in which [it] is framed, and if that is plain the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1916). Moreover, Congressional "intent may appear implicitly in the language or structure of the statute." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). It follows that "[a]ll laws are to be given a sensible construction; and a literal application of a statute, *which would lead to absurd consequences*, should be avoided whenever a reasonable application can be given to it, consistent with legislative purpose." *United States v. Katz*, 271 U.S. 354, 357 (1926) (emphasis added).

If Mr. Carter is precluded from bringing a subsequent suit, a precedent will be established wherein a wholly uninformed whistleblower could file a vexatious, frivolous, overbroad and all-

encompassing lawsuit. The government would be left as uninformed of the fraud as it was prior to the filing of the suit, and other well-informed whistleblowers would have no incentive or ability to come forward.

A. Once Dismissed Without Prejudice the Duprey And Texas Actions Were No Longer "Pending"

The voluntary dismissals of the Texas and Duprey claims, regardless of what induced those dismissals, mean, for purposes of the FCA, that they were, effectively, never filed. It is beyond dispute that voluntary dismissals, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), "completely terminate[d] the litigation, without further order by the district court." *Perkins v. Johnson*, 118 Fed.Appx. 824, 825 (5th Cir. 2004); *Long v. Bd. of Pardons and Paroles of Tex.*, 725 F.2d 306, 306 (5th Cir. 1984).

Moreover, "a voluntary dismissal without prejudice leaves the situation as if the action had never been filed. After a dismissal the action is no longer pending in the court and no further proceedings in the action are proper." *Id.*; *Long*, 725 F.2d at 306. Thus, "[a] suit that is voluntarily dismissed under Rule 41(a) generally is treated as if it had never been filed," *Nelson v. Napolitano,* 657 F.3d 586, 587-88 (7th Cir. 2011), and does not count as a pending action against the first-to-file rule. The Texas and Duprey actions, which were voluntarily dismissed by the

plaintiffs, have no effect on the status of Mr. Carter's action, as they are "treated as if [they] had never been filed." *Id.*[21]

B. Allowing Mr. Carter To Re-File Would Not Promote Frivolous Lawsuits

In order to *prevent* the filing of frivolous lawsuits, Mr. Carter must be allowed to re-file his lawsuit. While Petitioners and the Chamber of Commerce paradoxically argue that allowing such a suit would diminish the purpose of the first-to-file bar, just the opposite is true. The Chamber clumsily argues that the first-to-file bar was designed to create a "race to the courthouse," and encourage suits be brought forward quickly. In fact, the natural consequence of this would be to encourage frivolous, overbroad, all-encompassing lawsuits brought by plaintiffs without all of the facts, creating a circumstance where subsequent, more-substantiated claims would be precluded. The Chamber's interpretation would preclude the effectiveness of insiders to come forward with well-informed claims.

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[21] In light of the case law addressing the Federal Rules of Civil Procedure and dismissals without prejudice, it would be unreasonable to hold that Congress, during any of its legislation involving the FCA in the last thirty years, assumed that a dismissal without prejudice could meet its definition of "pending action. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)(."Congress is understood to legislate against a background of common-law adjudicatory principles.").

C. § 3730 Is Not A "Notice" Pleading Statute

The FCA does not operate as simply a "notice" regime, but instead requires substantial evidence and information because Congress understood that claims brought under this statute would be the only means by which many acts of fraud would be perceived. Congress purposefully and carefully required that an action brought by a private person under FCA include a "complaint and written disclosure." 31 U.S.C. § 3730(b)(2).

Congress has, in the past, established notice-regime whistleblower laws. The Internal Revenue Service had a reward law in effect in 1986 which simply required the whistleblower to fill out a one page form, known as Form 211. 26 C.F.R. 301.7623-1(a). The theory behind this doctrine is that the information presented in Form 211 is sufficient to put the IRS on notice, at which point they can, after analyzing the information received from the whistleblower, either investigate the matter itself or assign it to the appropriate IRS office. Congress did not utilize a "notice" rule in crafting the FCA. Instead, Congress required whistleblowers to provide *detailed* notice through a mandatory "disclosure" statement *and* required whistleblowers to also file a valid and formal complaint in the appropriate U.S. District Court. Furthermore, Congress amended the IRS whistleblower statute in 2006 by providing for

mandatory whistleblower rewards. 26 U.S.C. § 7623 (1954), *amended by* 26 U.S.C. § 7623(b) (2006). However, Congress deliberately kept the statute as a notice regime, clearly differentiating the FCA's requirement of a complaint and written disclosure.

"Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another." *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991). In § 3730, Congress specifically required a "complaint and written disclosure." 31 U.S.C. § 3730(b)(2). While Congress merely called for the filling out of a form in § 7623, it required substantially greater pleading requirements in § 3730. To ignore these "specific provisions" of the statute is to "ignore[ ] the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *See Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Instead, "invocation of the terms of the statute itself takes" into account the processes of compromise in Congress and, in the end, supports the "effectuation of congressional intent." *See Id.*

D. Section 3730(b)(5) Only Bars Subsequent Qui Tam Actions Arising From Interchangeable Facts

The plain meaning of the statute, along with the statutory intent, requires a finding that subsequent actions are only barred as against

previous claims based upon interchangeable facts. The FCA is intended to provide the government with a population full of "private attorney generals." *McKesson Corp.*, 649 F.3d at 330. As such, it is clear that Congress, in enacting the FCA in 1863, was concerned with securing information and alleviating all forms of fraud. Allowing for a broad definition of "related" would counteract this purpose by precluding claims that might inform the government of ongoing fraudulent activity.

Another stated goal is to prevent opportunistic and parasitic suits while encouraging citizens to act as whistleblowers. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 547, 63 S. Ct. 379, 386, 87 L. Ed. 443 (1943) (Jackson, J., dissenting); *see also* False Claims Act Implementation: Hearing Before the Subcommittee on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990) (1986 amendment "sought to resolve the tension between encouraging people to come forward with information and preventing parasitic lawsuits") (statement of Sen. Grassley).

Consistent with the language and intent of the 1986 amendments, Justice Jackson emphasized in his dissenting opinion in *Hess* that parasitic cases are those brought when an informer literally brings a civil case using identical facts alleged in a criminal charge brought by the government. *Hess*, 317 U.S. at 547

(dissenting opinion by Justice Jackson). That fear does not apply when parties bring claims based upon unrelated facts, facts for which no other case is pending or claims that were not subject to a dismissal with prejudice.

Defining "facts underlying the pending action" as "interchangeable" facts *would preserve* the balance of the amendment's two competing goals. It would set a high bar for subsequent lawsuits, while preventing the parasitic suits. *See United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1154 (3d Cir. 1991).

IV. THE SANCTIONS PROVISION IN § 3730(d)(4) DISALLOWS THE USE OF THE "FIRST-TO-FILE" BAR AS A TOOL FOR POLICING FRIVOLOUS LAWSUITS

Proponents of the broad "first-to-file" bar argue that it is necessary to protect both businesses and the judicial system from burdensome frivolous claims. Such a fear only unsubstantiated and without merit. The FCA has a special provision designed by Congress to police frivolous or harassing lawsuits. 31 U.S.C. § 3730(d)(4). The language of this sanctions provision, paired with the demonstrated legislative intent and the way the provision has been successfully used in deterring and dismissing frivolous claims in the past, shows that it is the sole provision meant to police potentially frivolous claims.

The argument that affirming the Fourth Circuit's holding on the "first-to-file" issue would lead to recurring frivolous lawsuits is unpersuasive in light of § 3730(d)(4). This section was added into the FCA by Congress and authorizes sanctions against a plaintiff if a court finds that the plaintiff's claim is frivolous, vexatious, or was brought for the purposes of harassment. *Herbert v. National Academy of Sciences*, No. 90-2568, 1992 U.S. Dist. LEXIS 14063, at *1, *3 (D.D.C. Sept. 15, 1992). The section provides, in relevant part, that "if the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment." 31 U.S.C. § 3730(d)(4).

The sanctions provision's importance is twofold. First, it allows a private citizen to bring a qui tam action against an entity involved in fraudulent practices. Second, and more relevant to the purposes of this brief, it allows a prevailing defendant to be awarded reasonable attorneys' fees where it can be demonstrated that the relator has acted inappropriately, in the manner for which Congress decided was improper. This sanctioning authority is in addition to other tools

courts can use to sanction harassing lawsuits, such as Federal Rule of Civil Procedure 11.

The provision adequately and efficiently serves the legislative intent of the Act. It does not discourage whistleblowers from providing the government with a detailed disclosure statement regarding substantially all of the whistleblower's information related to the fraud, nor does it dissuade them from filing a confidential complaint. It does, however, discourage meritless and baseless claims. Thus, the government's interest in obtaining information about fraud is served, without risking overburdening the system with frivolous claims.

The act was clearly constructed in a particular way to fulfill its purpose of encouraging citizens with relevant information to aid the United States Government in rooting out fraud.

It is a cardinal principle of statutory construction that a document is read as a whole and each provision is given meaning, so that no provisions render others superfluous, void, or insignificant. *See Corley v. United States*, 556 U.S. 303 (2009). It is clear from the language of the statute, and from the legislative intent, that the purpose of § 3730(d)(4) is to prevent non-meritorious cases from being brought. As such, reading § 3730(b)(5) to do the same would effectively render § 3730(d)(4) superfluous and unnecessary.

Furthermore, the proposed redundant reading of § 3730(b)(5) to contain a restrictive first-to-file bar would result in absurd and dangerous results. A broad first-to-file bar would promote poorly or hastily filed claims under the FCA that lack the specificity for which Congress intended when it required *qui tam* plaintiffs to file a formal complaint in U.S. District Court that would have to conform to the Federal Rules of Civil Procedure, including Rule 11, as opposed to crafting a simple notice-filing law, such as existed within the IRS. *See United States ex rel. Gudur v. Deloitte & Touche*, 2008 WL 3244000 (5th Cir. Aug. 7, 2008) (case dismissed under Fed. R. Civ. P. 9(b) for not meeting fraud action pleading requirements). A first-to-file-bar would, in such a circumstance, create a situation where a wrongdoer is forever protected from the legal consequences of their actions, simply because a claim was improperly or hastily filed. Under Petitioners' theory, such a dismissal would impede and disincentivize valid whistleblowers, who possessed the detailed information for which Congress was attempting to encourage the filing thereof, from filing information with the government.

Not only could reading such a first-to-file-bar into § 3730(b)(5) lead to an absurd result, it would also materially alter the careful sanctions-framework constructed by Congress which balanced the need for the Justice Department to obtain reasonable notice of high quality

information with the need of defendants to obtain sanctions against plaintiffs who abused the law in the manner prohibited by Congress in § 3730(b)(5).

Under the current law, although there have been very few frivolous lawsuits filed, Courts have found filing claims based upon previously litigated events frivolous without relying on a first-to-file-bar. *See United States ex. rel. Pugach v. M&T Mortgage Corp.*, 2008 U.S. Dist. Lexis 117231 (E.D.N.Y. July 3, 2008), dismissing claim under FCA on grounds of res judicata. While there are very few cases of such a "frivolous" nature, (presumably due to the fact that most people do not have the time or desire to file frivolous claims and, therefore, do not), the cases that do address the issue do it broadly enough so that the concern of frivolity is effectively covered by § 3730(d)(4). *See Herbert v. Nat'l Acad. of Scis.*, U.S. Dist. LEXIS 14063 (1992); 1992 WL 247587. *Cooper and Assoc. v. Bernard Hodes Group,* 422 F. Supp. 2d, 225 (D.D.C. 2006). *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006 (9th Cir. 2002).

V. THE "FIRST-TO-FILE" BAR CANNOT OPERATE TO DISMISS A CLAIM UNLESS CONSENT IS OBTAINED PURSUANT TO § 3730(b)(1)

Notwithstanding all of the independently sufficient arguments detailed above, the case before this Court is also barred from being

dismissed under the § 3730(b)(1) dismissal bar. This section states that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." 31 U.S.C. § 3730(b)(1). The language of the section could not be clearer, and unambiguously states that the Attorney General must consent for a *qui tam* action to be dismissed. *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1397 (9th Cir. 1992).

The Attorney General has effectively enforced the consent requirement in § 3730(b)(1) to combat actions taken by district courts and parties supporting a "defendants' desire to maximize preclusive effects." *Searcy v. Philips Electronics N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997). *Searcy*, involved the district court's dismissal of a *qui tam* claim as the result of a settlement agreement reached between the qui tam plaintiff and defendant. *Id.* at 155. The Attorney General objected to the dismissal based upon the Government's required consent in § 3730(b)(1), however, the district court overruled the objection. *Id.* On the Government's appeal to the Fifth Circuit, the court ruled that the Attorney General's consent was required to dismiss a *qui tam* case, thereby acknowledging the creation of the Attorney General's veto power in § 3730(b)(1). *Id.* at 160. In the case before this Court, a similar situation exists. Here, the defendants are seeking a dismissal of a *qui tam* claim without any consent by the Attorney

General, as required by statute. The case simply *cannot* be dismissed under § 3730(b)(5) when § 3730(b)(1) has not been satisfied.

Moreover, this is not a case where the application of the dismissal bar could infringe on the authority of the courts. Some disagreement exists as to whether the dismissal bar covers dismissals that are normally within the court's sole authority, such as some dismissals under Fed. R. Civ. P. 41(b). *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990). In the case at hand, however, dismissal is sought under the authority of § 3730(b)(5), the first-to-file protection. Therefore, applying the § 3730(b)(1) dismissal bar here does not interfere with the court's authority, but rather it is an acknowledgement that where a dismissal is sought under the authority of specific provisions within the FCA, the dismissal must comply with sections of the FCA that specifically govern dismissals.

This case does not raise any separation of power issues since dismissal is sought under the authority of § 3730(b)(5). The dismissal bar ensures recognition that the Government is a "real party in interest" in all *qui tam* suits. *United States ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 930, 129 S. Ct. 2230, 2232, 173 L. Ed. 2d 1255 (2009). It is clear that the Attorney General has an important role in determining whether a *qui tam* suit should be dismissed or if it violates first-to-file protections.

Congress did not intend for defendants to use § 3730(b)(5) as a sword.

VI. THE LEGISLATIVE HISTORY SUPPORTS THE HOLDING OF THE FOURTH CIRCUIT

Petitioners urge this Court to adopt an interpretation of § 3730(b)(5) that bars all claims related to the underlying facts once an initial suit is filed. The Petitioners' view is focused on the position that the Government is put on notice by the initial filing, and ignores the fact that the intent of the *qui tam* provisions in the FCA is remedial in nature. However, § 3730(e)(2) requires that relators serve the Government with a "copy of the complaint and a written disclosure of substantially all material facts and information the person possesses." This provision demands far more than simple notice to the government.

The 1986 amendments were designed not just to provide notice to the government of a fraud, but to induce whistleblowers to provide detailed information of substantially all their original information that would permit the plaintiffs to pursue the fraud "if the government fails to adequately pursue the individual's allegations of false claims." This provision in the law was drafted recognizing the reality that "the often heavy, sporadic workload of Government attorneys may create a situation where a *qui tam* plaintiff is better able to conduct the litigation in

a timely matter." S. Rep. no. 345, 99th Cong., 2d Sess., 26 (1986).

The "Committee's overall intent in amending the *qui tam* section of the False Claims Act [was] to encourage more private enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess., 23-24 (1986). The legislative history makes clear that the interest of Congress in enacting § 3730(b)(5) was to enable the U.S. Government to intervene in *qui tam* suits and to prohibit multiple parties from separately filing the same cause of action concurrently. The Senate Report asserts that, although "there are few known instances of multiple parties intervening in past *qui tam* cases," "the Committee wishes to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on *identical facts and circumstances*." S. Rep. no. 345, 99th Cong., 2d Sess., 25 (1986) (emphasis added).

Under the FCA, the primary goal sought by Congress was to encourage plaintiffs to bring forth actions. The Act arose "from a realization that the Government needs help--lots of help--to adequately protect the taxpayer funds from growing and increasingly sophisticated fraud." Remarks by Senator Grassley, 132 Cong. Rec. 28580, Oct. 3, 1986. At the same time, Congress sought to enable the Government (and only the Government) to intervene and to prohibit additional parties from concurrently bringing

forth the same causes of action. Thus, as Senator Grassley remarked when discussing agreed upon changes by the House and Senate to the False Claims Amendments Act of 1986, "[t]he expanded qui tam provisions serve to establish a solid partnership between public law enforcers and private taxpayers in the fight against fraud[.]" Remarks by Senator Grassley, 132 Cong. Rec. 28580, Oct. 3, 1986. While the "role of the qui tam plaintiff was expanded to allow participation as a party to the action," "the court is granted greater discretion to impose limitations in certain circumstances on the participation of the qui tam plaintiff[.]" Id.

Even if for some reason Congress did include a perpetual first-to-file protection, the case before the court would not fall within the scope of the first-to-file protection because it is not a "related action based on the facts underlying" any other relator action alleging false claims under the FCA. The Congressional report states that first-to-file rule protects the plaintiff against "separate suits based on identical facts and circumstances." This protects quality informers who bring quality actions against specific false claims where "[e]ach separate bill, voucher or other 'false payment demand' constitutes a separate claim." Sen. Rep. at 7 (citing *United States v. Bornstein*, 423 U.S. 303 (1976) and *United States v. Collyer Insulated Wire Co.*, 84 F. Supp. 493 (D.R.I. 1950)).

CONCLUSION

The judgment of the Fourth Circuit below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL,
Petitioners,

v.

UNITED STATES OF AMERICA, *EX REL.* BENJAMIN CARTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("Suspension Act"), should apply to civil *qui tam* actions brought under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA").[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed tc ensuring a reasonable interpretation of a federal statute affecting businesses, by adhering closely to the plain meaning

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amicus also states that counsel of record for the petitioners and for the respondent have filed with the Court their respective blanket consent letters, consenting to the filing of amicus curiae briefs in support of either or neither party.

of the text. When, as here, a federal statute suspends substantially, if not indefinitely, the statute of limitations for certain offenses against the Government, the scope of that statute should be interpreted narrowly, and according to the ordinary meaning of its terms. As this case illustrates, the removal of certain language in the evolution of a statute should be interpreted with common sense, with careful attention to that statute's text and context, and with the goal of resolving any ambiguities in favor of repose for the defendant. This approach will best preserve the protections afforded a defendant under the applicable statute of limitations, such as the avoidance of stale claims that may no longer be defensible due to the passage of time.

It is clear that the Suspension Act already subjects Government contractors to the risk of long-delayed criminal prosecution over potentially long delayed claims. Evidence and witnesses that may be essential to the contractor's defense may have been lost due to the passage of time during a protracted armed conflict, such as the current situation in Iraq and Afghanistan. Essential evidence may even be lost due to the lengthy armed conflict itself. A decision extending the Suspension Act to civil *qui tam* claims under the FCA would therefore expose potential business defendants to the lingering uncertainty, disruption, and prejudice in having to defend otherwise stale criminal *and* civil claims. In NELF's view, Congress could never have intended such a burdensome result, which would impose substantial costs on businesses and the federal judiciary alike.

In this connection, NELF has filed a number of other amicus briefs in recent cases before this Court, which have addressed similar issues of statutory interpretation that affect businesses.[2]

For these and other reasons discussed below, NELF believes that its brief in this case will assist the Court in deciding the issue whether the Suspension Act should apply to civil *qui tam* claims brought under the FCA.

SUMMARY OF ARGUMENT

The Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("Suspension Act"), applies exclusively to crimes of contractor fraud against the Government. The Fourth Circuit's opinion to the contrary is based entirely on a misunderstanding of a crucial piece of the Act's statutory history. In 1944, Congress deleted the phrase "*now* indictable

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[2] *See, e.g.*, *Atlantic Marine Constr. Co. v. United States Distr. Ct. for the Western Dist. of Tex.*, 134 S. Ct. 568 (2013) (forum selection clause designating particular federal judicial district generally enforceable, in motion to transfer venue under 28 U.S.C. § 1404(a)); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (standard of but-for causation, and not mixed-motive liability, applies to Title VII retaliation claims); *Vance v. Ball State*, 133 S. Ct. 2434 (2013) (employer vicariously liable for hostile work environment under Title VII only when harassing employee is capable of taking tangible employment actions against victim); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (absent contrary congressional command, Federal Arbitration Act ("FAA") requires enforcement of class action waivers in arbitration of federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (FAA preempts state law effectively requiring class arbitration as condition for enforcing consumer arbitration agreements).

under existing statutes," which had modified the word "offenses" in the 1921 and 1942 predecessor statutes to the Suspension Act. The lower court concluded that Congress' removal of the phrase "now indictable" in 1944 expanded the meaning of the word "offenses" to include non-indictable, civil claims.

The lower court erred. The operative word here is the adverb "now," and not the word "indictable," which is already subsumed in the ordinary criminal meaning of the word "offense." Therefore, the unusual phrase "*now* indictable" was merely a *temporal* restriction on the word "offenses." The phrase limited the 1921 and 1942 statutes to *past* crimes of contractor fraud. An offense was "*now* indictable" if it had already occurred, and was still timely, when those statutes took effect. Accordingly, when Congress removed the phrase "*now* indictable" in 1944, it simply extended the Suspension Act to *future* offenses of contractor fraud. By no means, then, did the 1944 amendment affect in any way the exclusively criminal meaning of the word "offense."

Significantly, Congress in 1942 borrowed the phrase "*now* indictable," perhaps too hastily, from the 1921 statute, which had extended the criminal statute of limitations for past, post-World War I acts of contractor fraud that were still timely when that statute took effect. In fact, the marginal note for the phrase "now indictable" in the 1921 Session Laws reads: **"Application to prior acts."** Pub. L. No. 67-92, ch. 124, 42 St. 220 (1921). The legislative history of the 1921 statute confirms further that the phrase "*now* indictable" was intended merely to

restrict the scope of that statute to past, post-war acts that were still timely. Thus, the 1942 statute was also limited to past acts because it borrowed that phrase *verbatim* from the 1921 statute. And the 1944 amendment removed that temporal restriction from the 1942 statute.

The temporal function of the phrase "*now* indictable" is also confirmed by the sentence that immediately follows it, in both the 1921 and 1942 statutes. That sentence explained that those statutes would not apply to acts that were time-barred; the statutes would apply only to *timely* past acts. Moreover, the legislative history for the 1921 statute explains that, in so limiting itself to timely past acts, the 1921 statute would thus comply with the *Ex Post Facto* Clause of the United States Constitution.

While the 1944 amendment retained this same sentence appearing in the 1921 and 1942 statutes, it also deleted the "*now* indictable" restriction. This indicates that the 1944 statute was *both* prospective and retrospective, applying to past and future crimes of contractor fraud. This makes sense because the 1942 statute had not suspended offenses occurring after its effective date. Accordingly, the 1944 statute filled this gap in coverage by suspending the limitations period for any timely past offenses, while also suspending any future offenses, including crimes arising under the new Contract Settlement Act of 1944.

The story is completed in 1948, when Congress, during peacetime, enacted a permanent

and entirely *prospective* Suspension Act. Accordingly, Congress in 1948 deleted the sentence, discussed above, that had appeared in the 1921, 1942, and 1944 statutes on the issue of timely past acts. The 1948 legislative history confirms that this sentence, discussing retroactivity, was deleted because it was no longer necessary.

In sum, the Suspension Act has always applied exclusively to crimes of contractor fraud. By deleting the phrase "*now* indictable," Congress in 1944 merely removed a temporal restriction on the word "offenses," which had limited the 1921 and 1942 predecessor statutes to past crimes of contractor fraud. Therefore, the relator's civil *qui tam* complaint in this case is not covered by the Suspension Act and should be dismissed as untimely under the FCA.

ARGUMENT

I. THE WARTIME SUSPENSION OF LIMITATIONS ACT APPLIES EXCLUSIVELY TO CRIMES OF CONTRACTOR FRAUD AGAINST THE GOVERNMENT.

At issue is whether the Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 ("Suspension Act"), a Criminal Code provision, suspends the running of the statute of limitations for civil claims of fraud against the Government. The Suspension Act applies to "any *offense* [] involving [contractor] fraud against the United States," and suspends the running of the applicable statute of limitations during, and for five years after, an armed conflict.

18 U.S.C. § 3287 (emphasis added).[3] The False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"), in turn,

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[3] The Suspension Act provides, in relevant part:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, . the running of any statute of limitations applicable to any *offense* (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

18 U.S.C. § 3287 (emphasis added).

The parties apparently dispute whether the current version of the Suspension Act, as amended in 2008, applies to this case, which involves alleged facts occurring in 2005. See *United States ex. rel. Carter v. Halliburton et al.*, 710 F.3d 171, 174-75 (4th Cir. 2013). *See also* Wartime Enforcement of Frauds Act, Pub. L. No. 110-417, § 855, 122 Stat. 4545, 4545-46 (2008) (codified as amended at 18 U.S.C. § 3287) (amending Suspension Act to include congressionally authorized armed conflicts, and to enlarge post-conflict suspension period from three to five years). However, the Court need not reach this issue because the Suspension Act has remained unchanged in its application to "any *offense* [] involving fraud . against the United States . " 18 U.S.C. § 3287 (emphasis added). This is the sole statutory language that need be interpreted to

protects the Government from contractor fraud and provides both criminal and civil remedies. 18 U.S.C. § 287 (criminal enforcement);[4] 31 U.S.C. § 3730 (civil enforcement). As part of its civil remedies, the FCA allows private citizens, or "relators," to bring suit on behalf of the Government. 31 U.S.C. § 3730(b). These civil *qui tam* claims under the FCA are subject to a six-year limitations period. 31 U.S.C. § 3731(b)(1).

The respondent in this case, Benjamin Carter, filed the *qui tam* complaint at issue against the petitioners, Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc. (collectively "KBR"), more than six years after KBR's alleged acts of contractor fraud. *See United States ex. rel. Carter v. Halliburton et al.*, 710 F.3d 171, 174-76 (4th Cir. 2013). The Fourth Circuit held that the Suspension

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decide the central issue, discussed in this brief, of whether the Act applies to civil *qui tam* claims under the FCA.

[4] Section 287 of the Federal Criminal Code, titled "False, fictitious or fraudulent claims," provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287.

Act applied to civil claims of contractor fraud against the Government, and thus allowed Carter to proceed on the merits of his otherwise untimely FCA complaint. *See id.*, 710 F.3d at 179-80. In essence, then, the issue here is whether civil claims of contractor fraud against the Government are suspended substantially, if not indefinitely, due to the lengthy and ongoing armed conflicts in Iraq and Afghanistan.

NELF agrees with the arguments already presented by KBR, and by other amici, that the Suspension Act applies only to *crimes* of contractor fraud. NELF does not repeat those arguments here. Instead, amicus argues in detail below that the Fourth Circuit's decision is based entirely on a misunderstanding of a crucial piece of the Suspension Act's statutory history.

A. Congress' Deletion Of The Phrase "Now Indictable" From The Suspension Act In 1944 Merely Removed A Temporal Restriction On The Word "Offenses," Which Had Limited The 1921 and 1942 Predecessor Statutes To Past Crimes of Contractor Fraud.

The Fourth Circuit's decision rests entirely on a misapprehension of a 1944 amendment to the Suspension Act. In 1944, Congress deleted the unusual phrase "*now* indictable under existing statutes," which had modified the words "offenses involving [contractor fraud]" in a 1942 predecessor statute. *See* An Act to suspend temporarily the

running of statutes of limitations applicable to certain offenses, Pub. L. No. 77-706, ch. 555, § 1, 56 Stat. 747, 747-48 (1942) ("1942 statute") (emphasis added)).[5] *See also* Contract Settlement Act of 1944, Pub. L. No. 78-395, ch. 358, § 19(b), 58 Stat. 649, 667 (1944) (deleting "now indictable ." phrase from 1942 statute).[6]

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[5] The 1942 statute provided:

> [T]he running of any existing statute of limitations applicable to *offenses* involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and *now indictable* under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations *has not yet fully run*, but it shall not apply to acts, offenses, or transactions which are *already barred* by the provisions of existing laws.

56 Stat. at 747-48 (emphasis added).

[6] In particular, § 19(b) of the Contract Settlement Act of 1944 amended the 1942 statute as follows:

> (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C., Supp. II, sec. 590a), is amended to read as follows: 'The running of any existing statute of limitations applicable to any *offense* against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement,

The lower court concluded erroneously that Congress' removal of the words "now indictable" from the Suspension Act in 1944 expanded the meaning of the word "offenses" in that act to include non-indictable, civil claims. *See Halliburton*, 710 F.3d at 179. The Fourth Circuit is apparently not alone in so interpreting this 1944 amendment. *See id.*, 710 F.3d at 179-80 (citing several other cases reaching same conclusion).

The Fourth Circuit, along with the other courts that have reached the same conclusion, erred by failing to interpret the complete phrase "*now* indictable." Instead, the lower court focused exclusively, and improperly, on the 1944 amendment's removal of the single word "indictable." However, "[i]nterpretation of a word or phrase depends upon reading the *whole statutory text*, considering the purpose and context of the statute, and *consulting any precedents or authorities* that inform the analysis." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006) (emphasis added).

> award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations *has not yet fully run*, but it shall not apply to acts, offenses, or transactions which are *already barred* by provisions of existing law.'

58 Stat. at 667, § 19(b) (emphasis added).

The lower court also failed to consider the clear origins of the unusual phrase "*now* indictable." Congress first used the phrase "*now* indictable" in a similar statute enacted in 1921. That statute was enacted on a temporary basis to extend the criminal statute of limitations for *past* offenses occurring immediately after the First World War. *See* An Act to amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases, Pub. L. No. 67-92, ch. 124, 42 St. 220 (1921) ("1921 statute").[7] Significantly, the marginal note appearing alongside the phrase "now indictable" in the 1921 Session Laws reads: **"Application to prior acts."** 42 St. at 220.

The 1942 statute, in turn, borrowed this "*now* indictable" phrase, perhaps too hastily, from the

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[7] The 1921 statute amended the general criminal statute of limitations as follows:

> Sec. 1044. No person shall be prosecuted, tried, or punished for any *offense*, not capital unless the *indictment* is found . within *three years* next after such offense shall have been committed: *Provided, however,* That in *offenses involving the defrauding* or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, *and now indictable* under any existing statutes, the period of limitation shall be *six years*. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations *has not yet fully run*, but this proviso shall not apply to acts, offenses, or transactions *which are already barred* by the provisions of existing laws.

42 Stat. at 220 (emphases added and in original).

1921 statute. *See Bridges v. United States*, 346 U.S. 209, 217-19 (1953) (discussing origins of 1942 statute in 1921 statute). Therefore, the 1942 statute was, by operation of its plain terms, also restricted to *past* crimes of contractor fraud. And the 1944 amendment deleted this "*now* indictable" restriction, thereby applying the Suspension Act to *future* offenses of contractor fraud.

Therefore, a proper interpretation of the complete phrase "*now* indictable," informed by its statutory origins, establishes that the phrase functioned merely as a *temporal* restriction on the word "offenses," in the 1921 and 1942 predecessor statutes to the Suspension Act. An offense was "*now* indictable" if it had already occurred, and was still timely, when those statutes took effect. Thus, the 1921 and 1942 statutes were limited to past crimes of contractor fraud, while the 1944 amendment applied the Suspension Act to future crimes. By no means, then, did the 1944 amendment affect in any way the exclusively criminal meaning of the word "offense."

i. The operative word in the statutory phrase "now indictable" is the adverb "now," which indicates that the offense must have already occurred, and still be timely, when the statute took effect.

The starting point here is the plain and *complete* language of the Suspension Act, which, before 1944, required that an offense must be "*now* indictable under any existing statutes" to receive a suspended limitations period. *See* 1942 statute, 56 Stat. at 747-48; 1921 statute, 42 St. at 220. A proper interpretation of the complete phrase "*now* indictable" establishes that the phrase was merely intended as a *temporal* restriction on the word "offenses" in the 1921 and 1942 predecessor statutes. An offense was "*now* indictable" under those statutes if the crime had already occurred, and was still timely, when those statutes took effect.[8]

The salient word here is the adverb "now," and *not* the word "indictable," which is already

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[8] Therefore, under the three-year criminal limitations period then in effect, the 1942 statute would have applied only to crimes of contractor fraud that had occurred within three years before that statute's effective date of August 24, 1942. *See* 56 Stat. at 748, § 2 (effective date). *See also* An Act to amend section 1044 of the Revised Statutes relating to limitations in criminal cases, chap. 56, 19 Stat. 32, 32-33 (1876) (three-year criminal limitations period then applicable). In 1954, the criminal limitations period was expanded from three to five years. *See* Act of September 1, 1954, Pub. L. No. 769, ch. 1214, § 10(a), 68 Stat. 1142, 1145 (1954) (codified as amended at 18 U.S.C. § 3282(a)).

subsumed in the ordinary criminal definition of the word "offense." After all, Congress has, from 1921 until the present day, always codified the Suspension Act in the *Criminal Code* and has consistently understood the term "offense" as a synonym for the word "crime." *See* n.7, above. *See also* S. Rep. No. 110-431, at 1-2 (2008) ("This legislation will protect American taxpayers from *criminal contractor fraud* by giving investigators and auditors the time they need to thoroughly review contracts related to the ongoing conflicts in Iraq and Afghanistan.") (discussing 2008 amendment to Suspension Act) (emphasis added); 61 Cong. Rec. H7060 (daily ed. Oct. 31, 1921) (statement of Rep. Graham, sponsor of bill H.R. 8298) ("As the war ended on the 11th of November, 1918, it will be seen that a great many of these *crimes* are already barred by the statute of limitations . However, in the period following the war, *crimes* were committed which are not yet barred [Thus,] the statute should be so extended that if there has been *crime* the Department of Justice may prosecute.") (emphasis added); Black's Law Dictionary, *available at* http://thelawdictionary.org/offense/ (as visited Sept. 4, 2014) ("offense" includes indictable and non-indictable *crimes*).

Indeed, the adverb "now" heads the entire phrase "*now* indictable under any existing statutes," and is therefore the key word "to finding a single, more uniform interpretation of th[at] statutory phrase ." *Hertz Corp. v. Friend*, 559 U.S. 77, 92 (2010). Accordingly, the adverb "now" tells us *when* the offense must have been indictable to fall under that statute. With the adverb "now," Congress in

1921 and 1942 designated the statute's effective date as the operative event--i.e., the "now" in "*now* indictable"--for determining which offenses would receive a suspended limitations period. Only this interpretation can give full meaning to the phrase "*now* indictable," while also adhering to the Court's instruction that the Suspension Act should be construed *narrowly* in favor of repose. *See Bridges*, 346 U.S. at 215-16 (discussing same). *See also Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 131 S. Ct. 716, 724 (2011) ("[W]e must give effect to *every word* of a statute wherever possible.") (citation and internal punctuation marks omitted) (emphasis added).

Moreover, it would be superfluous to include the word "now" in the phrase "now indictable" if Congress had intended the 1921 and 1942 statutes to apply to future offenses of contractor fraud. After all, most any criminal statute would, *by default*, apply exclusively to future acts. "The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively." *Johnson v. United States*, 529 U.S. 694, 701 (2000).[9]

Clearly, the use of the qualifying adverb "now" was intended to *reverse* this presumption of prospectivity and thereby restrict the application of the 1921 and 1942 statutes to past crimes of contractor fraud. In fact, the House Committee Report accompanying the 1921 statute confirms this

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[9] The *Ex Post Facto* Clause provides: "No . . . ex post facto Law shall be passed." U.S. Const., art I, § 9, cl. 3.

point. That report contains a statement from the then Solicitor General that the 1921 statute should be drafted clearly to apply to past and not future acts, thereby overcoming the presumption of prospectivity:

> [C]are should be taken that the amendatory statute should be clearly made *to apply to offenses already committed*, for, in the absence of such clear intendment, there is a tendency on the part of the courts to hold that the amendatory statutes *are prospective* and that it was not the legislative intent to make them apply to *crimes already committed.*

H. Rep. No. 67-365, at 2 (1921) (emphasis added). *See also Johnson,* 529 U.S. at 701 ("Absent a clear statement of that intent [to apply a criminal statute retroactively], we do not give retroactive effect to statutes burdening private interests").

In sum, the Fourth Circuit erred by disregarding the operative word "now" in the phrase "*now* indictable." In so doing, the lower court isolated the word "indictable" from its immediate context and misinterpreted the 1944 amendment as having expanded the definition of the word "offense" to include non-indictable, civil claims. As a result, the lower court failed to see that the phrase had served merely to restrict the 1921 and 1942 statutes to past offenses of contractor fraud. Accordingly, removal of that phrase in 1944 merely extended the

Suspension Act to future offenses of contractor fraud.

ii. The 1942 statute borrowed the phrase "now indictable" from the 1921 statute, which had extended the criminal limitations period only for past acts of contractor fraud that had occurred immediately after the First World War.

As amicus has noted above, Congress in 1942 borrowed the phrase *"now* indictable under any existing statutes," perhaps too hastily, from the 1921 statute, a temporary post-war statute that was later repealed in 1927. *See* An Act Amending section 1044 of the Revised Statutes of the United States as amended by the Act approved November 17, 1921, Pub. L. No. 70-3, ch. 6, 45 Stat. 51 (1927) (repealing 1921 statute). Indeed, this Court has recognized that the 1942 statute borrowed much from the 1921 statute:

> [The 1942 statute] was a wartime measure reviving for World War II substantially the same exception to the general statute of limitations which, from 1921 to 1927, had been directed at the war frauds of World War I. In 1942, the reports and proceedings demonstrate a like purpose, coupled with *a design to readopt the World War I policy*.

Bridges, 346 U.S. at 217-19. *See also* S. Rep. No. 77-1544, at 1-2 (1942) (discussing 1921 statute in detail when proposing 1942 suspension statute).

It is clear that the 1921 statute was intended solely to extend the criminal limitations period for *past* offenses of contractor fraud that were still timely, i.e., that were "*now* indictable," when that statute took effect. As amicus has already noted above, the marginal note appearing alongside the phrase "*now* indictable," in the 1921 Session Laws, stated: **"Application to prior acts."** 42 St. at 220.

The legislative history of the 1921 statute further confirms that the phrase "*now* indictable" was intended to restrict the 1921 statute to past offenses of contractor fraud. *See* H. Rep. No. 67-365, at 2 (Solicitor General's statement that 1921 statute should be worded clearly to apply to prior acts). Notably, the 1921 statute was enacted after the First World War, when the (then) three-year criminal statute of limitations had already run for most wartime acts of contractor fraud. *See* 61 Cong. Rec. H7060.[10] *See also* H. Rep. No. 67-365, at 2

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[10] As Congressman Graham, the sponsor of the 1921 bill, explained:

> Section 1044 of the Criminal Code provides a period of limitation of *three years* on almost all offenses against the Government, such as might have been committed at any time *during or since the war*. As the war ended on the 11th of November, 1918, it will be seen that a great many of *these [past] crimes are already barred* by the statute of limitations, the bar having been complete on the 11th of November, 1921, as to all *crimes committed during the war*

(discussing same). However, in 1921, the criminal statute of limitations had not yet run with respect to offenses of contractor fraud that had occurred during the immediate aftermath of the First World War, i.e., within the three years after Armistice Day (November 11, 1918), until the statute's effective date of November 17, 1921. *See* 42 St. at 220, § 2 (effective date). *See also* n.7, above; H. Rep. No. 67-365, at 1-2.[11]

> *period*. As to all such crimes, no prosecution can now be had. However, *in the period following the war*, and in the things that grew out of the war, *crimes were committed which are not yet barred*, and it has been thought useful, inasmuch as the Attorney General is now investigating many of these matters, that the statute should be so extended that if there has been crime the Department of Justice may prosecute.

61 Cong. Rec. H7060 (emphasis added).

[11] In particular, the 1921 House Committee Report states:

> The Department of Justice has been engaged in the investigation . of various alleged offenses, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany *and since its conclusion*. Under the existing statute of limitations, . . . many of these alleged crimes are already barred . . *However, as to a very large and considerable number of cases*, if prosecutions might be found necessary, the same could be had if the existing statute were extended so that the Government might have the opportunity, not only to make an investigation, but thereafter to begin the necessary prosecutions.

During those three years, 1918 to 1921, the Government maintained a military presence in Europe.[12] This active participation in the war's aftermath gave rise to potential crimes of contractor fraud. *See* 61 Cong. Rec. H7060 ("[I]n the period following the war, and in *the things that grew out of the war*, crimes *were* committed which *are* not yet barred ") (emphasis added). And, as both Congress and this Court have recognized, the exigencies of wartime and its immediate aftermath are the sole justification for extending the limitations period for crimes against the Government. *See Bridges*, 346 U.S. at 218 (discussing H. Rep. No. 67-365, in which "Congress was concerned with the exceptional opportunities to defraud the United States that were inherent in its gigantic and hastily organized procurement program [during the First World War]. It sought to help safeguard the treasury from such frauds by increasing the time allowed for their discovery and

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H. Rep. No. 67-365, at 1-2 (quoted in *Bridges*, 346 U.S. at 218 n.17) (emphasis added).

[12] "The United States did not formally end its involvement in the war until the Knox–Porter Resolution was signed on 2 July 1921 by President Warren G. Harding." http://www.quickiwiki.com/en/First_World_War (as visited Sept. 4, 2014). Moreover, "American soldiers remained in Europe for some time [after Armistice Day] as the demobilization continued, guarding against renewed hostilities."
http://www.eur.army.mil/organization/history.htm (as visited Sept. 4, 2014). In particular, U.S. troops entered Germany in December 1918 and occupied that country in some capacity until January 23, 1923. *See id.*

prosecution."). *See also Bridges*, 346 U.S. at 219 (discussing Government's general lack of sufficient resources during wartime to investigate and prosecute crimes of contractor fraud, as identified in legislative histories of 1921 and 1942 statutes).

In short, any past offenses of contractor fraud that had occurred during those three years after Armistice Day (1918-1921) were the "*now* indictable" offenses targeted by the 1921 statute. Those offenses would accordingly receive an extended limitations period under the 1921 statute.

However, the nation's involvement in the First World War's aftermath had diminished substantially by November 17, 1921, when the 1921 statute took effect. *See* n.11, above. Thus, there was no longer any war-related urgency to justify extending the limitations period to future crimes of contractor fraud. Accordingly, future offenses were excluded from the 1921 statute, i.e., they were not "*now* indictable." *See* 61 Cong. Rec. H7060 ("[I]n the period following the [First World] war, and in the things that grew out of the war, crimes *were committed* which are not yet barred [in 1921] ") (emphasis added). Thus, the general three-year statute of limitations would apply to those future crimes of contractor fraud.

When Congress adopted the same "now indictable" language in the 1942 statute, it simply "readopted the [same] World War I policy," *Bridges*, 346 U.S. at 219, and thereby restricted the 1942 statute, perhaps unwittingly, to *past*, timely offenses of contractor fraud. That is, the 1942 statute applied

only to offenses that had occurred within three years before that statute's effective date of August 24, 1942. *See* 56 Stat. at 748, § 2 (effective date). Indeed, the legislative history of the 1942 statute suggests an uncritical, virtually wholesale adoption of the language of the 1921 statute. *See Bridges*, 346 U.S. at 217-19. *See also* S. Rep. No. 77-1544, at 1.

iii. By deleting the phrase "now indictable" in 1944, Congress simply removed the temporal restriction to past offenses from the 1942 statute and thereby applied the Suspension Act to future offenses of contractor fraud.

Importantly, the 1944 amendment to the Suspension Act corrected this apparent drafting error in the 1942 statute by deleting the phrase "*now* indictable." In so doing, Congress applied the Suspension Act to future offenses of contractor fraud, i.e., offenses occurring after the statute's effective date (July 21, 1944). *See* 58 Stat. at 670, § 24(a) (statute effective twenty days after enactment). *See also id.* at 671 (statute enacted July 1, 1944). Congress apparently recognized in 1944 that it made no sense to limit a wartime suspension statute to past offenses of contractor fraud when the country was in the midst of a second world war of uncertain duration.

Congress had another compelling reason to delete the "*now* indictable" restriction in 1944. In that year, Congress passed the Contract Settlement

Act, mentioned above. Pub. L. No. 78–395, ch. 358, 58 Stat. 649 (1944). The Contract Settlement Act created new substantive rights for Government contractors, to ensure the "speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement " 58 Stat. at 649, § 1(b). But the Contract Settlement Act also protected the Government from fraudulent abuse of those new contract settlement rights, including the criminal prosecution of any such offenses. *See* 58 Stat. at 668, § 19(d).

Consequently, the Contract Settlement Act amended the 1942 suspension statute by adding this new category of crimes of contract settlement fraud. 58 Stat. at 667, § 19(b)(2). *See also Bridges*, at 217 n.15 ("This [1942 statute] was amended in 1944 by the insertion of more specific references to war contracts "). By definition, these were new offenses that could only occur after the Contract Settlement Act's effective date (July 21, 1944). Thus, these offenses of contract settlement fraud were not "*now* indictable" when the 1942 statute took effect. Accordingly, Congress in 1944 deleted the phrase "*now* indictable." 58 Stat. at 667, § 19(b). In so doing, Congress allowed the Suspension Act to apply to new crimes arising under the Contract Settlement Act and the FCA.

B. Other Statutory Language Occurring *Verbatim* In The 1921 And 1942 Statutes Confirms That The Phrase "Now Indictable" Merely Restricted Those Statutes To Past Crimes Of Contractor Fraud.

Lest any doubt remain about the purely temporal function of the phrase "*now* indictable," that phrase is immediately followed, in both the 1921 and 1942 statutes, by the same sentence: "This Act shall apply to acts, offenses, or transactions *where the existing statute of limitations has not yet fully run,* but [the Act] shall not apply to acts, offenses, or transactions which are *already barred* by the provisions of existing laws." (emphasis added).[13]

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[13] Clearly, the words "offenses," "acts," and "transactions," as used in the sentence above, are all referring exclusively to *crimes* of contractor fraud against the Government. After all, the 1921 statute enlarged the general *criminal* statute of limitations with respect to such offenses. *See* n.7, above. Moreover, the accompanying 1921 House Committee Report uses the words "offense," "transaction," and "crime" interchangeably when discussing the need to enlarge the criminal limitations period for post-war acts of contractor fraud:

> The Department of Justice has been engaged in the investigation . . . of various alleged *offenses*, consisting largely of frauds against the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged *offenses* grew out of the *contractual relation* of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds.

42 St. at 220 (1921); 56 Stat. at 747-48 (1942). This sentence, appearing *verbatim* in the 1921 and 1942 statutes, clarifies that those two statutes applied exclusively to past ("*now* indictable") offenses that were still timely under the three-year criminal statute of limitations then in effect. That is, neither statute would revive past offenses that were already time-barred.

This interpretation is borne out by the House Committee Report to the 1921 statute, which contains a detailed discussion of how the proposed statute would not offend the *Ex Post Facto* Clause of the United States Constitution:

> There is no legal question as to the right of the Congress to thus extend the period of the statute [to past acts that are still timely]. [T]he general rule seems to be that where the statute of limitations has not fully run, the legislature may extend the period of limitation and such law does not violate the ex post facto law of the Constitution or any other right of the defendant.

> Many of these *transactions* require the most minute investigation in order to ascertain the exact facts Under the existing statute of limitations, . . . many of these *alleged crimes* are already barred . . . .

H. Rep. No. 67-365, at 1-2 (emphasis added).

67 H. Rep. No. 67-365, at 2. It should be noted that Congress' understanding of the *Ex Post Facto* Clause in 1921 was entirely consistent with the Court's modern precedent. *See Stogner v. California,* 539 U.S. 607, 616-17 (2003) (holding that *Ex Post Facto* Clause bars revival of expired criminal claim, but expressing approval of statute extending limitations period for prior act that is still timely).

The 1944 statute retained this same sentence, appearing in the 1921 and 1942 statutes, that distinguished between timely and untimely past acts. However, the 1944 statute also eliminated the phrase "*now* indictable," as amicus has discussed above. This indicates that the 1944 statute was both prospective and retrospective in reach. The 1944 statute applied prospectively because Congress deleted the phrase "*now* indictable" and thereby removed the *exclusively* retrospective restriction on the statute's scope. But the 1944 statute also applied retrospectively because it retained the sentence discussing the statute's application to timely past acts.

The 1944 statute's dual scope--both prospective and retrospective--makes sense because, as amicus has noted, the 1942 statute had been limited to past ("*now* indictable") offenses. Therefore, the 1942 statute did not suspend offenses occurring after its effective date (July 24, 1942), even though World War II was still ongoing. Accordingly, the 1944 statute filled this gap in coverage by suspending any past "offenses where the existing statute of limitations has not yet fully run," i.e., acts

occurring between July 24, 1942 and the 1944 amendment's effective date (August 24, 1944).

The story is completed in 1948, when Congress, during peacetime, enacted a permanent and entirely *prospective* Suspension Act. Wartime Suspension of Limitations Act, Pub. L. 80-772, ch. 645, § 3287, 62 Stat. 683, 828 (1948) (codified as amended at 18 U.S.C. § 3287) (suspending offenses of contractor fraud "when the United States is at war ").[14] Tellingly, Congress in 1948 deleted the sentence, discussed above, that distinguished between timely and untimely past acts in the 1921, 1942, and 1944 statutes. The Revision Notes to the 1948 statute confirms that this sentence discussing past acts was deleted because it was no longer necessary:

> The phrase "when the United States is at war" was inserted at the beginning of this section to make it permanent instead of temporary legislation, and to obviate the necessity of reenacting such legislation in the future. This permitted the elimination of references to dates *and to the provision [appearing in the 1921, 1942, and 1944 statutes] limiting the application of the section to transactions not yet fully barred.*

18 U.S.C. § 3287, Historical and Statutory Notes (Revision Notes and Legislative Reports) (1948).

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[14] Notably, the 1948 statute has remained unchanged to the present day, for purposes of the issue discussed in this brief. *Compare* 62 Stat. at 828, § 3287 *with* 18 U.S.C. § 3287.

In conclusion, the Fourth Circuit's decision rests entirely on a misapprehension of the meaning of the phrase "*now* indictable," and its removal in 1944. The Suspension Act has always applied exclusively to "offenses," i.e., *crimes* of contractor fraud against the Government. Contrary to the lower court's interpretation, Congress' deletion of the phrase "*now* indictable" in 1944 did not alter in any way the exclusively criminal meaning of the word "offense." Instead, the 1944 amendment merely removed the temporal restriction to *past* offenses that had limited the scope of the 1921 and 1942 statutes. In so doing, the 1944 amendment merely extended the Suspension Act to future offenses of contractor fraud. Therefore, the relator's civil *qui tam* complaint in this case should be dismissed because it is both untimely under the FCA and outside the scope of the Suspension Act.

CONCLUSION

For the reasons stated above, amicus respectfully requests that this Court reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-1497

Supreme Court, U.S.
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OCT 21 2014
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In The Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BENJAMIN CARTER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the False Claims Act's first-to-file provision, 31 U.S.C. § 3730(b)(5) – which creates a race to the courthouse to reward relators who promptly disclose fraud against the Government – functions as a "one-case-at-a-time" rule that allows subsequent relators with valuable information to file *qui tam* complaints, provided that no prior, related *qui tam* claim is pending at the time of filing.

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INTEREST OF AMICUS CURIAE[1]

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. TAFEF has worked to publicize the *qui tam* provisions of the False Claims Act ("FCA"), has participated in litigation as a *qui tam* relator and as *amicus curiae*,[2] and has provided testimony before Congress about ways to improve the FCA. TAFEF has a profound interest in ensuring that the FCA is appropriately interpreted and applied and strongly supports vigorous enforcement of the Act, based on its many years of work focused on the proper interpretation and implementation of the FCA.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief and that letters reflecting the consent of both Petitioners and Respondent have been filed with the Clerk.

[2] TAFEF has submitted briefs in this Court as *Amicus Curiae* in several cases in recent years, including: Brief for *Amicus Curiae*, *Schindler Elevator Corp. v. United States ex rel. Kirk*, No. 10-188 (Jan. 25, 2011); Brief of *Amicus Curiae*, *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 08-304 (Oct. 26, 2009); Brief of *Amicus Curiae*, *United States ex rel. Eisenstein v. City of New York, et al.*, No. 08-660 (Mar. 4, 2009); Brief of *Amicus Curiae*, *Allison Engine Co., Inc., et al. v. United States ex rel. Sanders*, No. 07-214 (U.S. Jan. 22, 2008); and Brief for *Amicus Curiae*, *Rockwell Int'l Corp., et al. v. United States, et al.*, No. 05-1272 (U.S. Nov. 20, 2006).

SUMMARY OF ARGUMENT

The FCA's first-to-file provision states that no person may bring a related action based on the facts underlying a "pending" action.[3] The provision is not ambiguous and therefore, pursuant to settled canons of statutory construction, it should be given its plain meaning to effectuate Congress' manifest intent – to preclude subsequently-filed *qui tam* cases if a prior related *qui tam* case is still "pending." As a majority of courts have held, the purpose of the first-to-file provision is to encourage knowledgeable relators to alert the Government to fraud promptly, while barring multiple *qui tam* cases alleging the same fraud against the same defendant from being litigated at the same time. This purpose is served by giving "pending" its plain meaning. Finding that "pending" means "first-filed," as Petitioners argue, would undermine the FCA's goal of encouraging relators to prosecute those who commit fraud, regardless of whether the Government has the knowledge and resources to do so on its own.

Petitioners' professed concern that giving the first-to-file provision its plain-language meaning will lead to an infinite number of follow on suits is without merit. Petitioners ignore a variety of limits on subsequent relators, including *res judicata* and collateral estoppel, the FCA's public disclosure provision, the FCA's statute of limitations provision, and the FCA's prohibition against *qui tam* suits where the Government has already initiated its own action to remedy the fraud. Notably, there is no

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[3] 31 U.S.C. § 3730(b)(5).

evidence supporting the "dire consequences" Petitioners suggest.

The history of the FCA and its first-to-file provision demonstrate that Congress intended that knowledgeable relators could bring suits on the Government's behalf to recover stolen taxpayer funds, even if the Government was already generally aware of the alleged fraud. Congress amended the FCA several times throughout the statute's history, including in 1943, 1986, 2009 and 2010. With these amendments, Congress sought to establish and refine the roles of relators and the Government in prosecuting fraud. With the 1986 amendments, Congress enacted the "public disclosure" rule and its "original source" exception to replace the prior "government knowledge bar." These provisions encourage relators to come forward even after the Government has been put on notice of an alleged FCA violation. The first-to-file provision, which was also created in 1986, works in conjunction with the other FCA provisions to ensure that fraud claims are brought to light quickly, and that informed relators have an incentive to pursue them when the Government chooses not to do so.

In practice, the Government often encourages cooperation between first and subsequent relators in order to glean the most useful information from those who can assist the Government in recovering taxpayer dollars stolen through fraud. Subsequent *qui tam* actions frequently provide the Government with vital additional information and cannot simply be categorized as "parasitic." Indeed, in many instances, a first-filed *qui tam* complaint stays under

seal for years and remains unknown to subsequent relators, who therefore cannot have any parasitic intent. In addition, some first-filed *qui tam* actions are dismissed purely on procedural, non-merits grounds, and holding that complaints suffering from such defects forever bar all subsequent related actions will deprive the Government of crucial information necessary to prosecute fraud, will defeat Congress' intent, and will lead to consequences that Congress could never have intended.

ARGUMENT

I. The Term "Pending," as Used in the First-to-File Rule, Must be Given Its Plain-Language Meaning, Lest the FCA be Turned on Its Head

Congress amended the FCA in 1986 and added the "first-to-file" provision, which states:

> When a person brings an action under [the FCA's *qui tam* provision], no person other than the Government may intervene or bring a related action based on the facts underlying the **pending** action.[4]

This provision – in conjunction with the other 1986 amendments to the FCA – furthers Congress' stated goal of strengthening the statute by encouraging knowledgeable persons to promptly alert the

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[4] 31 U.S.C. § 3730(b)(5) (emphasis added).

Government to fraud, while also preventing *qui tam*[5] suits that do not meaningfully add to the Government's investigation and efforts to recover stolen funds.[6] Contrary to Petitioners' assertion, the first-to-file provision was not principally designed to prevent parasitic lawsuits – that is the purpose of the FCA's public disclosure provision. Rather, the first-to-file provision was created to prevent multiple *qui tam* cases alleging the same fraud against the same defendant from being litigated at the same time. The first-to-file provision is clear – it only applies when a prior, related *qui tam* suit is still "pending." Giving "pending" its plain-language meaning furthers Congress' goal of encouraging relators to file their *qui tam* complaints without delay, while also permitting subsequent relators possessing valuable information to file suit if the first action has been dismissed before a final judgment has been entered. Petitioners propose a definition of "pending" under the first-to-file

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[5] "*Qui tam*" references FCA cases initiated by a private person – called a "relator" – on behalf of the Government. The term is shorthand for the phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "he who sues for himself as well as for the king." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768, n.1 (2000).

[6] *See, e.g.* S. Rep. No. 345, 99th Cong., 2d Sess. (1986), 1, 23-24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89 ("[t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."); *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 32 (1st Cir. 2009) (*quoting United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001) and observing that "a goal behind the first-to-file rule" is to provide incentives to relators to "promptly alert[ ] the government to the essential facts of a fraudulent scheme.").

provision that does not appear in any dictionary, and which severely undermines Congressional intent.

Petitioners ignore this plain meaning and seek to turn the provision into something entirely different, arguing that "pending action" should be applied to an earlier action that is no longer pending. This tortured interpretation of an unambiguous term violates bedrock tenets of statutory construction and would defeat Congress' intent and turn the FCA on its head. Indeed, the majority of courts to address this issue have rejected similar attempts to distort the meaning of the first-to-file provision.[7] Finding that "pending" simply means "first-filed" undermines the *qui tam* provision's purpose of encouraging relators to prosecute those who commit fraud, regardless of whether the Government has the resources, knowledge, or ability to do so on its own.[8]

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[7] *See, e.g.*, *United States ex rel. Chovanec v. Apria Healthcare Group Inc.*, 606 F.3d 361, 365 (7th Cir. 2010) (finding that the FCA "provides that if one person 'brings an action' then no one other than the Government may 'bring a related action' while the first is 'pending.'"); *In re Natural Gas Royalties Qui Tam Litig. (CO2 Appeals)*, 566 F.3d 956, 964 (10th Cir. 2009) ("The 'pending' requirement much more effectively vindicates the goal of encouraging relators to file; it protects the potential award of a relator while his claim remains viable, but, when he drops his action another relator who qualifies as an original source may pursue his own."); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001) (holding that the first-to-file provision barred a *qui tam* suit since a prior related *qui tam* suit – which was eventually dismissed – was still pending at the time the subsequent action was commenced).

[8] *See, e.g.*, 145 Cong. Rec. E1546, E1548 (July 14, 1999) (statement of Rep. Berman) ("One of the principal goals of the 1986 Amendments was to ameliorate the 'lack of resources on the part of Federal enforcement agencies.' That was one of the

A. Departing From the Plain Language Meaning of "Pending" Violates a Basic Rule of Statutory Interpretations and Frustrates Congressional Intent

This Court has previously cautioned against interpreting the FCA "in a way inconsistent with a plain reading of its text."[9] That caution applies here. The purpose of the first-to-file provision is to bar duplicative actions based on the facts underlying a related *qui tam* action that is still pending. The plain language of the first-to-file provision makes clear that no person may bring a related action based on the facts underlying a "pending" action. There is nothing ambiguous about the word "pending" in the context of the first-to-file provision, and thus, the term must be interpreted based on its plain meaning. When the 1986 FCA amendments were enacted, "pending" was defined as "[b]egun, but not yet completed; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is said to be 'pending' from its inception until the rendition of final judgment."[10] That definition

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reasons we strengthened the qui tam provisions of the law. Thus, we expected some meritorious cases to proceed without the Government's intervention, and we fully expected that the Government and relators would work together in many cases to achieve a just result.") (internal citation omitted).

[9] *See Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011).

[10] Black's Law Dictionary 1021 (5th ed. 1979).

remains unchanged today.[11] Yet, Petitioners would read "pending" out of the provision altogether, or ascribe an entirely new definition to the word.

Historically, when courts have departed from Congress' intent in construing the FCA, Congress has reacted by amending the statute to avoid further misinterpretations. In fact, the history of the FCA, discussed *infra*, reflects Congress' continual efforts – over the course of several decades – to calibrate the statute's *qui tam* provisions and correct judicial interpretations that diverged from congressional intent. For instance, the FCA was amended in 1943 in immediate response to the Court's ruling in *United States ex rel. Marcus v. Hess*.[12] In 1986, the statute was again amended, in response to the Seventh Circuit's decision in *United States ex rel. Wisconsin v. Dean*.[13] More recently, the FCA was amended in 2009 as part of the Fraud Enforcement and Recovery Act, after the Court's rulings in *United States ex rel. Totten v. Bombardier Corp.* and *Allison Engine Co. v. United States ex rel. Sanders*.[14] The next year, in light of the Court's consideration of the FCA issues in *Graham County Soil & Water District v. U.S. ex rel. Wilson*, Congress amended the statute

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[11] *See* Black's Law Dictionary 1314 (10th ed. 2014) (defining "pending" as "[r]emaining undecided; awaiting decision <a pending case>").

[12] 317 U.S. 547 (1943); *see* S. Rep. No. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5375-77.

[13] 729 F.2d 1100 (7th Cir. 1984); *see* S. Rep. No. 345, 99th Cong., 2d Sess., at 11, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78.

[14] 380 F.3d 488 (D.C. Cir. 2004); 553 U.S. 662 (2008); *see also* S. Rep. No. 111-10 (2009); 152 Cong. Rec. E1298 (June 3, 2009) (statement of Rep. Berman).

again – this time as part of the Patient Protection and Affordable Care Act – to clarify its intent.[15]

In light of this history of congressional adjustments, the fact that Congress has never amended the first-to-file provision is telling; the provision has worked as Congress intended. Only one circuit court has held that "pending" under the FCA should not be given its plain-language meaning – and that ruling is less than a year old and includes a vociferous dissenting opinion.[16] Other circuit courts have established that the first-to-file provision "applies only while the initial complaint is 'pending.'"[17] Congress has not seen fit to alter that interpretation. It is clear that this majority view – that "pending" plainly means "pending" – is in accord with Congress' intent.

B. Construing the First-to-File Provision to Preclude Suits Filed Only While a Related Suit Is Pending Will Not Lead to Infinite Follow-On Suits or Other Unintended Consequences

Contrary to Petitioners' contention, giving the term "pending" its plain-language meaning will not allow "an infinite series of duplicative claims so long

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[15] *See* 559 U.S. 280, n.1 (2010).

[16] *See United States ex rel. Shea v. Cellco P'ship*, 748 F.3d 338 (D.C. Cir. 2014).

[17] *See United States ex rel. Chovanec*, 606 F.3d at 365; *In re Natural Gas Royalties Qui Tam Litigation*, 566 F.3d at 963-64 (10th Cir. 2009); *United States ex rel. Lujan*, 243 F.3d at 1188.

as no prior claim is pending at the time of filing."[18] These presumed consequences – asserted by Petitioners without support – are unlikely when the FCA is viewed as a whole and evaluated in accordance with the rules of civil procedure generally.

Although the first-to-file rule permits a subsequent relator to bring a related *qui tam* suit after any earlier-filed *qui tam* suit has been dismissed and is no longer pending, the subsequent suit may be barred by a variety of other doctrines, including *res judicata* and collateral estoppel;[19] the FCA's statute of limitations;[20] the FCA's public disclosure provision;[21] and the statute's prohibition against *qui tam* suits whenever the Government has already brought its own civil action or administrative proceeding to remedy the fraud.[22]

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[18] Brief for Petitioners at I.

[19] *See, e.g. United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 936 (2009) (recognizing that "the Government is bound by the judgment" in *qui tam* suits); *United States ex rel. Chovanec*, 606 F.3d at 365 (acknowledging that "the doctrines of claim and issue preclusion" might "block[] anyone (including the United States) from filing additional suits dealing with" the fraud scheme alleged in two prior earlier-filed *qui tam* suits); *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 517-18 (6th Cir. 2009) ("[I]f the first-filed *qui tam* action has been dismissed on its merits or on some other grounds not related to its viability as a federal action, it can still preclude a later-filed, but possibly more meritorious, *qui tam* complaint under the first-to-file rule.").

[20] 31 U.S.C. § 3731(b).

[21] 31 U.S.C. § 3730(e)(4).

[22] 31 U.S.C. § 3731(e)(3).

These rules protect defendants from repetitive suits and discourage relators from delaying the filing of *qui tam* complaints or from bringing allegations in a piecemeal fashion – the result Petitioners speculate will occur if the first-to-file provision is given its plain-language meaning.[23] An earlier-filed *qui tam* suit that has been unsealed and eventually dismissed will likely have remained under seal for months, if not years; during that time, the statute of limitations will have continued to run. Thereafter, all other relators will be barred from filing related *qui tam* suits unless a series of conditions are satisfied, including: (1) the dismissal of the earlier case was not on the merits; (2) the subsequent relator is an original source of his/her fraud allegations; (3) the statute of limitations has not yet expired; and (4) the Government has not initiated its own proceeding. Once all of these contingencies are taken into account, it becomes evident that the possibility for subsequent related suits drops drastically. Petitioners present no evidence or examples supporting their assertion that reading the statute as it has been read by the majority of courts thus far has led to an "infinite series of duplicative claims."

Additionally, Petitioners' attempt to cast subsequent relators as "parasitic" is groundless and demonstrates a fundamentally flawed understanding of *qui tam* procedure.[24] The FCA requires relators to

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[23] Brief for Petitioners at 55.

[24] *See* Brief for Petitioners at 54, 57 (arguing that "[t]he [first-to-file] bar serves the broader purpose of . . . barring copycat actions that provide no additional material information," and mischaracterizing and misquoting the Fifth Circuit's holding in

file FCA *qui tam* complaints under seal, and those complaints remain under seal until the Government makes its intervention decision or moves to dismiss the action. Therefore, most subsequent relators are unaware of the existence of earlier-filed related *qui tam* actions. There is nothing parasitic about a well-informed, well-intentioned relator in California who happens to file her *qui tam* complaint days after another relator filed a related, sealed *qui tam* complaint in Virginia. On the contrary, the timing of the two filings is purely incidental, and there is no logical basis for Petitioners' suggestion that the subsequent complaint is parasitic or does not contain valuable and unique evidence of fraud.

Petitioners misconstrue the nature and purpose of the first-to-file provision – painting it as a provision designed to prevent parasitic lawsuits, rather than as a tool to encourage the timely filing of meritorious claims and to minimize interference in Government investigations resulting from multiple filings. As explained below, it is the purpose of the FCA's public disclosure provision – not its first-to-file provision – to prevent parasitic *qui tam* actions. By limiting the first-to-file provision only to situations in which a prior related *qui tam* suit is still pending, Congress created a race to the courthouse among relators with evidence of fraud. Congress did not forever bar all subsequent related *qui tam* complaints or preclude all subsequent valuable relators from assisting the Government in recovering stolen funds.

United States ex rel. Branch Consultants in an attempt to support that erroneous contention).

II. For Nearly Thirty Years, FCA Relators Have Not Been Barred from Filing *Qui Tam* Suits Simply Because the Government May Have Already Had Knowledge of the Fraud

The FCA was first enacted in 1863, as a means to combat rampant procurement fraud occurring during the Civil War.[25] The FCA was modeled after informer statutes that had been used in England and early in the history of this country.[26] Congress amended the Act several times since 1863, including in 1943, 1986, 2009, and 2010. With each amendment, Congress sought to refine the unique balance between the role of the Government and the role of relators who are incentivized to file suit on the Government's behalf in exchange for a percentage of the Government's recovery. The FCA makes clear that the Attorney General may bring a civil action under the statute.[27] However, Congress also understood that the Government will not have the capacity or resources to discover all FCA violations and file corresponding suits to recover all the funds stolen from the federal fisc.[28] Thus, the FCA also permits "a person" to bring a civil action "for the person and for the United States Government."[29]

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[25] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, *reenacted by* Rev. Stat. §§ 3490-3494, 5438 (1878)**Error! Bookmark not defined.**; *see also United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); S. Rep. No. 345, 99th Cong., 2d Sess. (1986), at 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

[26] *See United States ex rel. Marcus*, 317 U.S. at 542, n.4 (1943).

[27] 31 U.S.C. § 3730(a).

[28] *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 7, *reprinted in* 1986 U.S.C.C.A.N. at 5272-73.

[29] 31 U.S.C. § 3730(b)(1).

When a person brings an action for the United States, the statute provides that the action "shall be brought in the name of the Government."[30]

When the FCA was first enacted, the Government had no right to participate in *qui tam* actions, although the case could not be settled without the Government's consent.[31] When the FCA was amended in 1943, Congress for the first time allowed the Government to take over a case initiated by a relator.[32] Under the 1943 version of the FCA, if the Government took over a *qui tam* suit, then the relator had no continuing role in the litigation, but if the Government declined to intervene, then it had no opportunity to join the case at a later date.[33] In addition, during the early 1940's, relators often copied fraud allegations directly from indictments and, solely on the basis of that information, filed *qui tam* suits on behalf of the Government.[34] Without question, these suits were parasitic, as the relators simply took information from a "host" – the Government – and sought to profit at the host's expense, while offering nothing of value in return. In 1943, the Court upheld this practice,[35] and Congress immediately responded by enacting amendments to the FCA.[36] The amendments included a new

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[30] *Id.*

[31] *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 296; *United States ex rel. Marcus*, 317 U.S. at 547, n.11.

[32] *See* Act of Dec 23, 1943, ch. 377, 57 Stat. 608.

[33] *See id.*

[34] *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 10, *reprinted in* 1986 U.S.C.C.A.N. at 5275.

[35] *See United States ex rel. Marcus*, 317 U.S. 547.

[36] *See* S. Rep. No. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. at 5375-77.

"government knowledge" bar that precluded *qui tam* suits "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought" – regardless of whether the Government was aware that it possessed information, understood its significance, or made any effort to remedy the fraud, and regardless of whether the relator was the source of the Government's information.[37] Following the 1943 amendments, however, courts began erroneously construing the FCA to bar *qui tam* actions that were in no way parasitic.[38] As a result, the FCA fell into disuse among relators.

For instance, in *United States ex rel. Wisconsin v. Dean*, the State of Wisconsin had investigated and convicted a defendant of Medicaid fraud, and pursuant to applicable regulations, reported information regarding the fraud to the Federal Government. The State later filed a *qui tam* suit to recover damages and penalties on behalf of the Federal Government, and requested an exemption from the government knowledge bar. The Seventh Circuit reviewed the legislative history of the provision and rejected the State's request, holding that Wisconsin could not maintain its *qui tam* action on behalf of the Federal Government, which already possessed information regarding the fraud. The circuit court noted that any exemption to

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[37] Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

[38] *See, e.g.*, *United States ex rel. Wisconsin*, 729 F.2d 1100; *United States v. Rippetoe*, 178 F.2d 735 (4th Cir 1949); *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1949); *United States ex rel. Lapin v. Int'l Bus. Machines Corp.*, 490 F. Supp. 244 (D. Hi. 1980).

the government knowledge bar should be obtained from Congress.[39] Two years later, in 1986, Congress responded by overhauling and modernizing the FCA through significant amendments that encouraged more relators to file *qui tam* suits, thereby strengthening the law.[40] The 1986 amendments also further refined the relationship between the Government and relators, as Congress observed that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."[41] As several circuit courts have noted, the 1986 amendments were an attempt by Congress to encourage relators to start using the FCA again, while rewarding only deserving relators who add value and assist the Government by recovering stolen funds and combating fraud.[42]

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[39] *See United States ex rel. Wisconsin*, 729 F.2d at 1106.

[40] *See Graham County Soil & Water Conservation District*, 559 U.S. at 298 ("We do not doubt that Congress passed the 1986 amendments to the FCA 'to strengthen the Government's hand in fighting false claims,' and 'to encourage more private enforcement suits.'") (internal citations omitted); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227, 233-234 (3d Cir. 1998) ("Following a decline in qui tam litigation after the 1943 amendment, the legislature again amended the Act in 1986. The primary purpose of this change was to 'shift the advantage back to the government' in the fight against fraud.").

[41] S. Rep. No. 345, 99th Cong. 2d Sess., at 2, *reprinted* in 1986 U.S.C.C.A.N. at 5267.

[42] *See United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376-77 (5th Cir. 2009); *United States ex rel. Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005); *United States ex rel. LaCorte*, 149 F.3d at 233-234 ; *see also* 145 Cong. Rec. E1546 (July 14, 1999) (statement of Rep. Berman) (stating that "Three goals inspired the 1986 Amendments. First and foremost, Congress wanted to

In 1986, Congress codified the procedures relators must follow to file *qui tam* suits, requiring complaints to be filed under seal and to be served on the Government but not the defendant, and mandating that relators provide the Government with a "written disclosure of substantially all material evidence and information the person possesses."[43] The revised statute also provided to the Government an initial sixty-day period in which to investigate a relator's allegations before deciding whether to proceed with an action by intervening in a *qui tam* suit.[44] If the Government decides to intervene, then it takes primary responsibility for the litigation and the relator "shall have the right to continue as a party;" if the Government declines to intervene, then the relator will have the right to conduct the action without the Government.[45] The Government may also dismiss *qui tam* actions, even over the objections of a relator;[46] may settle a *qui tam* action without the relator's consent;[47] and may seek to restrict the relator's participation in an intervened suit, under certain circumstances.[48]

Thus, at the outset of every *qui tam* suit, the Government will have been made aware of all the

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encourage those with knowledge of fraud to come forward. Second, we wanted a mechanism to force the government to investigate and act on credible allegations of fraud. Third, we wanted relators and their counsel to contribute additional resources to the government's battle against fraud").

[43] 31 U.S.C. § 3730(b)(2).

[44] *Id.*

[45] *See id. at* § 3730(b)(4)(A) and (B).

[46] *See id.* at § 3730(c)(2)(A).

[47] *See id.* at § 3730(c)(2)(B).

[48] *See id.* at § 3730(c)(2)(C).

relator's material evidence and will have had an opportunity to investigate the fraud allegations. Without question, by the time any *qui tam* case is unsealed, the Government will have been alerted to the fraud. Yet, if the Government declines to intervene in the relator's suit and does not seek to dismiss the suit, then relators are not only permitted to pursue their claims on behalf of the Government but are specifically incentivized to do so. The FCA states that if the Government intervenes in a *qui tam* suit, then the relator's award will be between 15% and 25% of the Government's recovery.[49] However, if the relator proceeds without the Government's intervention, then the range for the potential reward increases to between 25% and 30% of the Government's recovery.[50]

The 1986 amendments reflect Congress' recognition that the Government simply lacks the resources to prosecute all viable FCA claims, even when it knows of fraudulent conduct.[51] Moreover, through the 1986 amendments, Congress sought to diminish the Government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government."[52] The FCA's *qui tam* provisions give relators a private right of action – even if the Government chooses not to act. As noted above, the 1986 amendments specifically bar *qui tam* actions

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[49] *See id.* at § 3730(d)(1).

[50] *See id. at* § 3730(d)(2).

[51] *See, e.g., United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995) (internal citation omitted), *vacated on other grounds*, 520 U.S. 939 (1997).

[52] *Id.*

after the Government becomes involved in a related civil or administrative proceeding. The fact that Congress included this provision and explicitly abandoned the government knowledge bar indicates that the Government's mere knowledge of the fraud is insufficient to preclude subsequent *qui tam* actions; instead, the Government must act on that knowledge by commencing its own civil action or administrative proceeding in order to preclude a related *qui tam* filing.

A. The FCA's "Public Disclosure" Provision Replaced the Government Knowledge Bar and Explicitly Permits Relators to File *Qui Tam* Suits After the Government has been Notified of the Fraud

Consistent with the goals of the 1986 amendments, Congress created a "public disclosure" provision, which replaced the government knowledge bar. As this Court recently recognized:

> Congress apparently concluded that a total bar on qui tam actions based on information already in the Government's possession thwarted a significant number of potentially valuable claims. Rather than simply repeal the Government knowledge bar, however, Congress replaced it with the public disclosure bar in

> an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits such as the one in Hess."[53]

The 1986 version of the public disclosure bar provision stated:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[54]

The amended statute also defined "original source":

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the

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[53] *Graham County*, 559 U.S. at 294.

[54] 31 U.S.C. § 3730(e)(5)(A) (1986); 132 Cong. Rec. 17,936 (1986).

> allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government.[55]

By creating the public disclosure provision, Congress eliminated the underlying assumption of the 1943 law – that the *qui tam* provisions were designed to allow relators to assist the Government only when the Government lacked information regarding the fraud.[56] Since 1986, the fact that the Government may have already been made aware of a fraud scheme has not served as a bar to *qui tam* suits.[57]

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[55] *Id.*

[56] *See Graham County*, 559 U.S. at 309 (*quoting Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) and stating that "[b]y replacing the Government knowledge bar with the current text of § 3730(e)(4)(A) and including an exception for 'original source[s],' Congress 'allowed private parties to sue even based on information already in the Government's possession.'").

[57] *See, e.g., In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 963 ("Allowing an original source to bring an action even when the government should be on notice of the fraud serves the purpose of the FCA by increasing valid enforcement actions. The government could lack the resources (or indeed, the political will) to pursue a claim, even if it has been set on its trail. The government might lack sufficient evidence of its own to win in court. In these cases, qui tam suits provide a valuable way to deter false claims and compensate the government for its lost revenue.").

B. The FCA's "First-to-File" Provision Fits Perfectly Within the Framework of the Amended Statute

Congress drafted the FCA's first-to-file and public disclosure provisions in 1986. Contrary to Petitioners' argument, the first-to-file bar was not principally concerned with rooting out parasitic relators, as the public disclosure bar was designed to address that issue.[58] Instead, the primary purposes of the first-to-file rule are to encourage relators to file *qui tam* suits without delay, while also preventing multiple *qui tam* cases alleging the same fraud against the same defendant from being litigated at the same time. Without the first-to-file provision, defendants would be subject to multiple simultaneous suits, resulting in potentially inconsistent judgments. In addition, the Government would be required to share its recoveries with multiple relators, even if a first-filed relator's allegations were sufficient to recover the Government's stolen funds.[59] Congress added the

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[58] *In re Natural Gas Royalties Qui Tam Litig.* 566 F.3d at 963 ("The public disclosure bar already removes jurisdiction from suits brought by relators who simply feed off another relator's complaint and offer no useful information to government officials who should already be on notice of the fraud. Applying that standard to the first-to-file bar will do no more to weed out opportunistic relators than the public disclosure bar already does."); 145 Cong. Rec. E1546 (July 14, 1999) (statement of Rep. Berman) (explaining that the public disclosure provision was drafted in 1986 "to deter so-called 'parasitic cases'").

[59] *United States ex rel. Chovanec*, 606 F.3d at 364 ("Me-too suits designed to divert some of the reward to latecomers do not serve any useful purpose, and they weaken the incentive to dig out the facts and launch the initial action. What's more,

first-to-file rule to restrict the number of suits – and the number of relators – that could bring the same FCA allegations at any given time against any individual defendant.

In view of the fact that Congress simultaneously enacted the first-to-file provision and abolished the government knowledge bar, it is clear that the first-to-file provision in no way limits relators' ability to file *qui tam* suits based on when the Government is already on notice of the alleged fraud. Any other result would directly conflict with the public disclosure provision, which in 1986

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secondary suits that do no more than remind the United States of what it has learned from the initial suit deflect recoveries from the Treasury to rewards under § 3730(d)."); *United States ex rel. Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 821 and 824 (9th Cir. 2005) (stating that the first-to-file bar "encourages prompt disclosure of fraud by creating a race to the courthouse among those with knowledge of fraud. . . The FCA reflects the strong congressional policy of encouraging whistleblowers to come forward by rewarding the first to do so."); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004) ("[O]riginal qui tam relators would be less likely to act on the government's behalf if they had to share in their recovery with third parties who do no more than tack on additional factual allegations to the same essential claim."); *United States ex rel. LaCorte*, 149 F.3d at 234 (discussing concerns that under an "overly narrow interpretation" of the first-to-file provision, "dozens of relators could expect to share a recovery for the same conduct, decreasing their incentive to bring a *qui tam* action in the first place."); *United States ex rel. Precision Co. v. Koch Indus. Inc.*, 31 F.3d 1015, 1018 (10th Cir. 1994) (stating that "[t]he *qui tam* complaint filed first blocks subsequent *qui tam* suits based on the same underlying facts. In so doing, the statute prevents a double recovery.") (citing *United States ex rel. Erickson v. American Inst. of Bio. Sci.*, 716 F. Supp. 908 (E.D. Va. 1989)).

explicitly allowed "original source" relators to sue, even after the fraud allegations were publicly disclosed "in a criminal, civil, or administrative hearing," including in a previous, unsealed *qui tam* suit.[60] "Because original sources are still permitted to bring a *qui tam* complaint after public disclosure, Congress clearly believed that original sources possessed valuable information that would assist the government in prosecuting false claims actions."[61] Congress reiterated that intent when it amended the public disclosure and "original source" provisions in 2009 to authorize the Government to oppose motions to dismiss on public disclosure grounds, recognizing that some original sources might "materially add" to the information already publicly disclosed.[62]

In short, the common-sense interpretation of the first-to-file provision – that "pending" means pending – is consistent with the public disclosure provision because it permits subsequent relators to come forward, even after the Government is on notice of the fraud. If a subsequent relator qualifies as an "original source" of fraud allegations, then the Government will benefit from a new *qui tam* filing, and if all prior related *qui tam* complaints have been dismissed, then the subsequent relator will have an

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[60] 31 U.S.C. § 3730(e)(4)(A)(i).

[61] *See United States ex rel. Campbell*, 421 F.3d at 822.

[62] 31 U.S.C. § 3730(e)(4)(A) and (B) (providing that, in the event of a qualifying public disclosure, a *qui tam* complaint will be dismissed on public disclosure grounds "unless opposed by the Government," and re-defining "original source" to include a relator "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.")

opportunity to earn a share of the Government's recovery.

Petitioners attempt to avoid this inescapable conclusion with flawed arguments and reasoning. They argue that pursuant to additional FCA amendments enacted in 2009 and 2010, the public disclosure provision is now only triggered by the disclosure of prior *qui tam* suits in which the Government intervened.[63] This characterization of the public disclosure provision is wholly mistaken.

First, Petitioners rely on this Court's opinion in *United States ex rel. Eisenstein v. City of New York*,[64] in which the Court held that unless the Government intervenes in a *qui tam* suit, it is not a party to the suit for purposes of Federal Rule of Appellate Procedure 4(a), and therefore, the relator has only thirty, not sixty days to file a notice of appeal. Without offering any support, Petitioners make the unfounded leap that the Court's interpretation of a rule of appellate procedure somehow informs the proper analysis of the FCA's amended public disclosure provision.

Second, section 3730(e)(3) of the FCA – which immediately precedes the public disclosure provision – already prohibits *qui tam* suits "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a

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[63] Brief for Petitioners at 50-51.

[64] *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009), cited in Brief for Petitioners at 50-51.

party."[65] Since all intervened *qui tam* suits are "civil suit[s] in which the Government is already a party," Petitioners' reading of the public disclosure provision would render section 3730(e)(3) superfluous, in contravention of well-established principles of statutory construction.[66] Moreover, nothing in the FCA suggests that when Congress amended the public disclosure provision in 2009 and 2010, it intended to recognize a distinction between the Government's status as a "party" and as a "real party in interest." In fact, the opposite is true. For example, FCA section 3730(c) is entitled "Rights of the parties to qui tam actions." Yet, subsection 3730(c)(3) discusses the Government's rights when "the Government elects not to proceed with the [*qui tam*] action." Clearly, Congress' reference to the Government as a "party" in section 3730 is not limited to intervened *qui tam* suits. Congress' intent in limiting the public disclosure provision to "a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party" distinguishes civil cases between private parties (including state court proceedings) from federal proceedings (including federal *qui tam* suits). Proceedings in the latter category presumably put the Government on notice of fraud – and thus,

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[65] 31 U.S.C. § 3730(e)(3).

[66] *See, e.g., Cooper Indust., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (stating that statutes must be construed in a manner that gives effect to all of their provisions); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (same); *TRW v. Andrews*, 534 U.S. 19 (2001) (same).

trigger the public disclosure provision – while those in the former category do not.[67]

Petitioners' arguments regarding the public disclosure provision have no merit. None of the amendments to the public disclosure provision changed the nature of the first-to-file rule, which still permits relators to file suit on behalf of the Government, in the event that neither the Government nor any other relator is currently pursuing those claims.

C. In Practice, First-Filed *Qui Tam* Complaints Are Often Insufficient to Recover the Government's Stolen Funds and the Government Actively Encourages Cooperation Between and Among First and Subsequent Relators in Order to Maximize Its Recoveries

Petitioners' position, if adopted, would deprive the Government of potentially valuable information that subsequent "original source" relators can offer – information that may be crucial to the Government in instances in which the first-filed relator's allegations are limited and do not include sufficient factual allegations to fully apprise the Government of the fraud. In practice, first-filed complaints are often lacking in detail regarding the conduct at issue, the full range of participants, or other essential

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[67] *See, e.g., United States ex rel. McKenzie v. Bellsouth Telecomms.*, 123 F.3d 935, 939 (6th Cir. 1997).

information. Thus, the Government has a vital interest in encouraging other relators who have additional information to come forward with their own *qui tam* complaints and to cooperate with any prior relators. As a leading FCA treatise notes, the Government has the right to seek dismissal of subsequent related *qui tam* complaints pursuant to the first-to-file rule, but the Government "has little incentive to do so. It is the author's experience that the government will first suggest to all relators that they mutually reach some agreement as to how to proceed with the case."[68] For that reason, the Government often encourages relators who allege the same general scheme to combine forces in order to provide the best and most accurate information to the Government and the courts.[69]

For example, in *United States ex rel. Howard v. Lockheed Martin Corp.*,[70] two relators filed an initial *qui tam* complaint in Ohio in 1999 and two other relators filed a related *qui tam* complaint against the same defendant in Georgia in 2002. As the Ohio court explained, "[t]he Government became aware of both suits, and upon leave of [both district courts], informed each set of Relators about the

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[68] James B. Helmer, Jr., False Claims Act: Whistleblower Litigation 771 (6th ed. 2012).

[69] *See, e.g., United States ex rel. Penizotto v. Bates East Corp.*, No. 94-3626, 1996 WL 417172, at *1 (E.D. Pa. July 18, 1996) (after two related *qui tam* suits were filed against overlapping defendants in two separate federal district courts, the Government intervened in both suits and successfully moved to transfer venue so that the two suits could be in the same court).

[70] No. 99-285, 2011 WL 4348104, at *1 (S.D. Ohio Sept. 16, 2011).

existence of the other."[71] The second set of relators voluntarily dismissed their complaint and the first set of relators moved to amend their complaint to add the second set of relators as co-plaintiffs; the Government did not oppose the motion.[72]

As explained above, Petitioners' argument that the first-to-file provision serves the purposes of "rejecting suits which the government is capable of pursuing itself," has no merit.[73] Congress rejected the government knowledge bar nearly thirty years ago in favor of a standard that recognizes that the Government will not bring every FCA suit that it "is capable of pursuing itself," and modified the FCA to offer higher rewards to relators who pursue the Government's recovery when the Government has been put on notice of the fraud but has decided not to pursue it.

D. Adopting Petitioners' Argument Would Lead to a Variety of Significant Unintended Consequences

Petitioners speculate that reading the statute as it was plainly written will lead to "dire" consequences, but fail to offer concrete evidence to support their assertion.[74] However, it is Petitioners' position that will lead to improper consequences, in conflict with congressional intent. For example, if the act of filing a first *qui tam* complaint bars all

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[71] *Id.* at *1.

[72] *Id.*

[73] Brief for Petitioners at 53.

[74] Brief for Petitioners at 4.

subsequent related complaints, then a *qui tam* suit that is dismissed for purely procedural reasons – *e.g.* the complaint was filed by a *pro se* relator[75] – would forever block all future relators from assisting the Government and recovering stolen tax dollars.

In addition, some courts have held that the first-to-file rule applies even if the first complaint does not satisfy Federal Rule of Civil Procedure 9(b)'s pleading requirement.[76] In that circumstance, adopting Petitioners' view could perversely incentivize those who commit fraud to immunize themselves by causing a sham *qui tam* complaint to be filed that is Rule 9(b)-deficient. Upon dismissal, the filing would prevent genuine relators from

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[75] *See, e.g., United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008) (holding that a private person may not bring an FCA *qui tam* action as a relator for the United States in a *pro se* capacity because FCA causes of action are not personal to relators.).

[76] *See United States ex rel. Batiste v. SLM Corp.*, 659 F.3d 1204, 1210 (D.C. Cir. 2011); *see also United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 36 (1st Cir. 2013) (holding that "for the purposes of the first-to-file rule, the earlier-filed complaint need not meet the heightened pleading standard of Rule 9(b)"); *United States ex rel. Wickliffe v. EMC Corp.*, 473 Fed. Appx. 849, 851 (10th Cir. Apr. 4, 2012) (declining to decide the issue, but noting that "[t]he circuits are split regarding whether the first-to-file bar incorporates 9(b)'s particularity requirement," and stating that it would be "uneasy" applying Rule 9(b)'s pleading requirements to the first-to-file provision); *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 379 (5th Cir. 2009) ("express[ing] no opinion on the as-yet unpresented question of whether a dismissal for lack of any factual basis or on Rule 9(b) grounds in the [first-filed] case would then permit a suit by [the relator] or any other person with knowledge of facts from suing [the defendant] without facing the first-to-file bar.").

subsequently coming forward and pursuing the Government's recovery.[77] True, once the first complaint is filed, the Government will have the ability to pursue the fraud on its own, but if the Government chooses not to file suit – in particular if the allegations in the first-filed complaint are not pled with particularity – then a subsequent, non-parasitic relator should be allowed to pursue those claims on behalf of the Government. This is the fundamental purpose of the *qui tam* law.

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[77] *See United States ex rel. Campbell*, 421 F.3d at 821 ("Congress sought to provide incentives to qui tam whistleblowers to come forward, and we believe that an overly broad interpretation of the first-to-file bar, allowing even sham complaints to preclude subsequent meritorious complaints in a public disclosure case, would contravene this intention."); *United States ex rel. Folliard v. Synnex Corp.*, 798 F.Supp.2d 66, 76 (D.D.C. 2011) (holding that an exception to the first-to-file rule should cover "sham complaints" that are filed "in an effort to preclude future relators from sharing in any bounty eventually recovered," and are "worded ... in excessively general terms for the purpose of thwarting later claims.") (citing *United States ex rel. LaCorte* and *United States ex rel. Walburn*); James B. Helmer, Jr., False Claims Act: Whistleblower Litigation 133-35 (6th ed. 2012) (noting that fraudsters "could buy a cheap insurance policy" by filing sham *qui tam* complaints, and stating that "[i]n the Senate's debates over the 1943 Amendments to the FCA, Senator Frederick Van Nuys explained that lawyers were bringing cases to uncover the evidence that the government was planning on using against them in criminal cases. We know of at least one well-known serial corporate violator of the FCA that toyed with the idea of filing technically defective FCA cases against itself to head off having to deal with relators and their counsel.").

CONCLUSION

The Court should affirm the judgment below and hold that the FCA's first-to-file provision bars subsequent related *qui tam* actions only while an earlier-filed action is still pending.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 12-1497

IN THE

Supreme Court of the United States

KELLOGG BROWN & ROOT SERVICES, INC., KBR INC., HALLIBURTON COMPANY, AND SERVICE EMPLOYEES INTERNATIONAL,

Petitioners,

v.

UNITED STATES EX REL. BENJAMIN CARTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR VERIZON AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Verizon is one of the nation's largest telecommunications service providers. This case implicates an issue of substantial importance to Verizon as a government contractor: the scope of the False Claims Act's "first-to-file" bar, which prohibits a private relator from filing a *qui tam* suit on behalf of the United States when a prior related *qui tam* action has already been filed. *See* 31 U.S.C. § 3730(b)(5).

Verizon has firsthand experience dealing with *qui tam* claims foreclosed by the first-to-file bar. The company and certain of its subsidiaries were named in related *qui tam* actions in the United States District Court for the District of Columbia. In those cases, a relator brought back-to-back suits against the company asserting precisely the same theory of alleged fraud. The district court dismissed the second-filed action with prejudice under the first-to-file bar. In a recent decision raising the same issue presented here, the D.C. Circuit affirmed that dismissal. *See United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 344 (D.C. Cir. 2014). The relator's petition for rehearing en banc was denied on July 16, 2014. The relator filed a petition for writ of certiorari with this Court on August 26, 2014.

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than Verizon made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The False Claims Act ("FCA") authorizes whistleblowers with insider information about fraud against the government to bring suit on behalf of the United States and, if successful, to retain a share of the recovery. The sizeable "cash bounties" available under the FCA can "supplement government enforcement," but they also create "the danger of parasitic exploitation of the public coffers." *United States ex rel. Springfield Terminal Ry. Co.* v. *Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). Congress has thus sought to achieve "'the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.'" *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 294 (2010).

The FCA's first-to-file bar is an important check on such opportunistic suits. It provides that "[w]hen a person brings an [FCA action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). By precluding private follow-on suits based on information already presented to the government in an earlier case but permitting the government to bring such a suit, the bar "furthers the statute's 'twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.'" *United States ex rel. Batiste* v. *SLM Corp.*, 659 F.3d 1204, 1208 (D.C. Cir. 2011); *accord Shea*, 748 F.3d at 343.

In this case, the Fourth Circuit held that "once a case is no longer pending[,] the first-to-file bar does not stop a relator from filing a related case." *United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013). That interpretation reads a temporal limit into the first-to-file bar and thus permits relators to bring an unlimited number of FCA suits based on the same facts so long as they are filed seriatim. The plain text of the bar contains no such temporal limitation. Although the statute uses the word "pending," that word in context merely serves to distinguish between the two actions referenced in the bar, the initial action and the second, related action. Had Congress wished to impose an important temporal limitation, it would have said so in language more obviously directed to that end.

The Fourth Circuit's interpretation is also contrary to the core purpose of the first-to-file bar—rejecting *qui tam* claims that the government could have pursued on its own. Once a *qui tam* action puts the government on notice of the alleged fraud, the dismissal of that action does not somehow put the government "off notice." There is simply no reason to pay a *qui tam* bounty to a relator who does nothing to bring new allegations of fraud to the government's attention.

Nor does the bar's legislative history support the Fourth Circuit's reading. The relevant committee reports nowhere mention the significant limitation the Fourth Circuit would impose.

In reaching its interpretation, the Fourth Circuit simply followed two prior decisions by the Seventh and Tenth Circuits. Those decisions, however, contained almost no analysis. The Tenth Circuit's discussion of a temporal limit on the bar was pure dicta, and the Seventh Circuit's analysis is set forth in a single sentence.

The D.C. Circuit's opinion in *Shea* is the only circuit court decision to have carefully analyzed the bar's text and purpose. *See* 748 F.3d at 343-344. It reached the opposite conclusion of the Fourth Circuit, rejecting an invitation to read a temporal limit into the bar. One judge of the D.C. Circuit dissented from this aspect of the panel's decision, but the dissent's arguments are unpersuasive for the reasons explained in more detail below.

The facts in *Shea* provide a compelling illustration of how the FCA's *qui tam* provisions could be abused if the Fourth Circuit's interpretation were permitted to stand. In that case, the relator filed back-to-back "related" suits alleging the precise same theory of fraud against Verizon. The only difference between the two cases was that, after filing his first suit, the relator located additional Verizon government contracts on the Internet and added those contracts to the second suit. Under the Fourth Circuit's view, the second action could freely proceed as soon as the original action was closed.

In opposing certiorari in this case, the Solicitor General argued that the "ordinary language" of the first-to-file bar compels the Fourth Circuit's reading of the statute. In prior briefs, however, the government has taken a contrary position. It has argued that the bar contains no temporal limit. The government's recent change of heart should be given no weight.

In sum, this Court should adopt the D.C. Circuit's interpretation of the first-to-file bar. When the government has already been put on notice of potentially fraudulent conduct by an earlier-filed FCA suit, a related action adds nothing—and thus should be precluded—regardless of whether the first-filed suit has been finally resolved.

ARGUMENT

I. THE FIRST-TO-FILE BAR PROHIBITS RELATED FOLLOW-ON *QUI TAM* SUITS EVEN AFTER THE EARLIER-FILED ACTION HAS BEEN RESOLVED

A. The Bar's Text, Purpose, And Legislative History Confirm That The Provision Contains No Temporal Limitation

1. The first-to-file bar provides that "[w]hen a person brings an action under" the False Claims Act, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The bar thus specifies the time when the bar commences—"[w]hen a person brings an action"—and provides that from that time forward, no person other than the United States may bring an action related to the one that is "pending" when the bar attaches. The word "pending" merely serves to distinguish between the two suits referenced in the statute—the first-filed action (which, by definition, is "pending" "when" it is filed) and any subsequent action (which is not). *See United States ex rel. Shea* v. *Cellco P'ship*, 748 F.3d 338, 343 (D.C. Cir. 2014).

The Fourth Circuit's contrary interpretation, which reads the word "pending" as a substantive, temporal limitation, treats the statute as if it provided: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action *while the first action remains pending*." This approach requires a court to read additional words into the statute and is inconsistent with the placement of the word "pending" in the statute. As the D.C. Circuit has observed, the phrase "'based on the facts underlying the pending action' merely clarifies 'related action.'" *United States ex rel. Batiste* v. *SLM*

Corp., 659 F.3d 1204, 1208 (D.C. Cir. 2011). The Fourth Circuit's interpretation would be clearly incorrect if the statute omitted this "clarif[ying]" phrase and simply read: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action." And there is no basis to believe that Congress meant to impose a significant limit on the first-to-file bar using a clarifying adjective in a clause that was merely intended to define what constitutes a "related" action.

Had Congress wanted to bar suits only while the first-filed action remained pending, it knew how to do so. For example, 28 U.S.C. § 1500 bars suits in the Court of Federal Claims only while the plaintiff "*has pending* in any other court any suit or process against the United States" based on the same claim. (Emphasis added.) Similarly, 42 U.S.C. § 300aa-11(a)(5)(B) precludes a person from bringing a vaccine-related claim in the Court of Federal Claims if he or she "*has pending* a civil action for damages for a vaccine-related injury or death." (Emphasis added.) As the D.C. Circuit explained, "[t]he simplest reading of 'pending' is the referential one; it serves to identify which action bars the other." *Shea*, 748 F.3d at 344; *see also United States ex rel. Powell* v. *American InterContinental Univ., Inc.*, 2012 WL 2885356, at *4 (N.D. Ga. July 12, 2012); *cf. United States ex rel. Duxbury* v. *Ortho Biotech Prods., L.P.*, 579 F.3d 13, 32-34 (1st Cir. 2009) (applying first-to-file bar even though the first-filed complaint was dismissed before the second relator filed suit).

2. The Fourth Circuit's interpretation also conflicts with a core purpose of the first-to-file bar: "discouraging opportunistic behavior" by barring serial *qui tam* actions once the government has been notified of potential fraud. *See United States ex rel. Hampton* v.

Columbia/HCA Healthcare Corp., 318 F.3d 214, 217 (D.C. Cir. 2003). By prohibiting follow-on actions "based on the facts underlying" an earlier action, the first-to-file bar helps "reject[] suits which the government is capable of pursuing itself." *Batiste*, 659 F.3d at 1208; *accord Shea*, 748 F.3d at 343 ("The plain-text reading of the statute" makes clear that a primary goal of the bar is to "'reject[] suits which the government is capable of pursuing itself[.]'"). "Once the government is put on notice of its potential fraud claim"—*i.e.*, when the first action is filed—then "the purpose behind allowing qui tam litigation is satisfied." *United States ex rel. Grynberg* v. *Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004); *see also* 31 U.S.C. § 3730(b)(2) (requiring relator to make a "written disclosure of substantially all material evidence and information" when he or she files suit). After all, "resolution of a first-filed action does not somehow put the government *off* notice of its content." *Shea*, 748 F.3d at 344 (emphasis added). Whether or not it is dismissed, the first-filed "action promptly alert[s] the government to the essential facts of a fraudulent scheme—thereby fulfilling a goal behind the first-to-file rule." *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001).[2] This commonsense view has also been adopted by the leading treatise on the FCA,

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[2] Respondent's suggestion that Petitioners' and the D.C. Circuit's interpretation of the bar "would result in permanent immunity from suit for any defendant based upon the filing of an inadequate, frivolous, or jurisdictionally defective complaint" (Respondent's Br. in Opp. ("BIO") 19 & n.10) thus misses the point. The first-to-file bar does not apply to the government, which would be free to pursue a suit against the entity named in the relator's complaint—if warranted—after the complaint gave the government notice of the wrongdoing. *See* 31 U.S.C. § 3730(b)(5) (bar applies *only* to "person[s] other than the Government"); *see also* Pet. Reply 9.

which observes that the bar's rationale "applies with equal force to earlier-filed cases that are already dismissed by the time a subsequent *qui tam* suit is filed." Boese, *Civil False Claims and Qui Tam Actions* § 4.03[C][2][b] (4th ed. Supp. 2014).

The Fourth Circuit's contrary interpretation would have the bar's applicability turn on the fortuity of when the first-filed case is resolved, which makes no sense in this context. Worse, the Fourth Circuit's reading hinders the United States' interest in maximizing recoveries of taxpayers' money. It forces the government to pay a 15 to 25 percent bounty to follow-on relators who bring cases the government was fully equipped to bring itself. *See* 31 U.S.C. § 3730(d)(1) (providing range for bounties in cases where the government intervenes to pursue the claim). Permitting relators to bring case after related case with a new bounty attached to each successive suit also incentivizes relators to disclose information in a piecemeal manner, rather than presenting everything to the government at once as is required by statute. *See* 31 U.S.C. § 3730(b)(2); *see also Shea*, 748 F.3d at 344 ("[R]eading the bar temporally would allow related *qui tam* suits indefinitely[.]").

3. The Fourth Circuit's reading finds no support in the legislative history. The House Report accompanying the False Claims Amendment Act of 1986 described the bar as follows: "When an action is brought by a person, no person other than the Government may intervene or bring a related action." H.R. Rep. No. 99-660, at 30 (1986). The Report omits any reference to a requirement that the initial action remain pending or to an exception for cases filed after the initial suit is resolved. Indeed, the Report's discussion of § 3730(b)(5) does not even mention the word "pending." Nor does the relevant section of the Senate Report, which mere-

ly states that the bar is meant to clarify that *qui tam* "enforcement ... is not meant to produce ... multiple separate suits based on identical facts and circumstances." S. Rep. No. 99-345, at 25 (1986). Had the word "pending" been meant as a substantive limit on the first-to-file bar—as opposed to mere shorthand for "first-filed action"—the House and Senate Reports surely would have mentioned it.

B. The Fourth Circuit's Reliance On Other Circuits' Case Law Is Misplaced

The Fourth Circuit did not independently analyze the statutory text: it simply adopted two other circuits' conclusory interpretations of the first-to-file bar. *See United States ex rel. Carter* v. *Halliburton Co.*, 710 F.3d 171, 183 (4th Cir. 2013) (citing *United States ex rel. Chovanec* v. *Apria Healthcare Group, Inc.*, 606 F.3d 361 (7th Cir. 2010), and *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956 (10th Cir. 2009)). Neither of the decisions relied upon by the Fourth Circuit, however, offered a meaningful analysis of the first-to-file bar's text, purpose, or legislative history.

The Tenth Circuit case did not even decide the question at issue in this suit. The court discussed the temporal scope of the first-to-file bar only in dicta while explaining its view of when two actions are "related." *See In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d at 964. And the Seventh Circuit's decision simply stated—in a single sentence—that the first-to-file bar ceases to operate once the original suit is resolved. *Chovanec*, 606 F.3d at 365; *see generally Shea*, 748 F.3d at 344 (noting that other circuits have offered minimal analysis on this question and that *Chovanec*'s and *Natural Gas Royalties*' discussions are essentially dicta).

The D.C. Circuit's opinion in *Shea* is the only circuit court decision that thoroughly analyzes the question presented in this case. It concluded that the bar applies even after the first-filed action has concluded.

C. The *Shea* Dissent Is Not Persuasive

Although the D.C. Circuit's opinion in *Shea* drew a partial dissent from Judge Srinivasan, *Shea*, 748 F.3d at 346-351, the dissent's arguments are not persuasive.

1. The dissent misconstrues the first-to-file bar's plain language. It contends that the meaning of the phrase "facts underlying the pending action" is clear even without the word "pending." 748 F.3d at 347. But without the word "pending," the "action" referenced at the end of the first-to-file bar might refer to the "related action" mentioned immediately beforehand (rather than the first-filed action alluded to at the beginning of the provision). *See* 31 U.S.C. § 3730(b)(5) ("When a person brings an action under" the False Claims Act, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."). In any event, it was surely reasonable for Congress to conclude that including the adjective "pending" would add clarity. Additionally, the dissent makes no attempt to explain why Congress would have buried such an important limitation on the bar in a clarifying phrase at the provision's tail end.

Citing 25 U.S.C. § 1300d-27(b)(2), the dissent also notes that Congress could have used a different phrase than "pending action"—such as "first action"—as a shorthand reference for first-filed action. 748 F.3d at 347-348. But 25 U.S.C. § 1300d-27(b)(2) involves circumstances where more than two actions might be at issue. And even if Congress could have used the modi-

fier "first" instead of "pending," the selection of one of two similar terms over the other ought not fundamentally change the scope of the bar.

The *Shea* dissent contends that the first-to-file bar's prohibition on *both* bringing a related action and intervening in the first-filed action suggests that Congress intended the first-to-file bar to operate only when the first-filed suit remains active because intervention is not possible once an action has been dismissed. 748 F.3d at 348. The fact that one cannot intervene in a suit that is no longer pending, however, says nothing about whether Congress intended the bar on bringing a subsequent action to expire upon dismissal of the first-filed case. Indeed, the dissent joined the panel majority in rejecting a very similar statutory argument that the first-to-file bar does not apply to the same relator who filed the original action because a litigant cannot intervene in his own action. *Id.* at 342-343 ("The statute is written in the disjunctive. A second relator need not be capable of both forms of prohibited behavior to be eligible for the prohibition. On Shea's reasoning, a statute that provided that 'no vehicles may fly over or drive through a field' could only apply to vehicles that could both fly and drive."); *id.* at 345 (Srinivasan, J., concurring in part and dissenting in part). That the bar on bringing a related action necessarily lasts longer than the bar on intervention is beside the point.

2. The dissent in *Shea* suggests that claim preclusion principles and the public disclosure bar obviate the need for the first-to-file bar to prohibit follow-on *qui tam* suits after the first-filed action is resolved or dismissed. 748 F.3d at 349; *see also* BIO 20-21.[3] But neither is an

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[3] 31 U.S.C. § 3730(e)(4)(A) requires dismissal of an action or claim if it rests on "allegations or transactions" that have already

adequate substitute for a properly interpreted first-to-file bar. Claim preclusion applies only in a limited set of circumstances. It extends only to causes of action arising out of the same "transaction, or series of connected transactions," not all "related" cases. *See Restatement (Second) of Judgments* § 24, at 196 (1982). It also applies only when there is a final judgment on the *merits* of the first action. *See, e.g., United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011); *see also Shea*, 748 F.3d at 349 (Srinivasan, J., concurring in part and dissenting in part) (conceding that "a follow-on action" may "sidestep[] claim preclusion" if "for instance ... the initial action was dismissed without prejudice").

Similarly, the public disclosure bar fails to capture certain actions properly foreclosed by the first-to-file bar. The public disclosure bar does not apply if the earlier suit remains under seal and thus has not been made public. The public disclosure bar also contains an exception for relators who qualify as an "original source" of the information at issue. *See* 31 U.S.C. § 3730(e)(4)(A).

The *Shea* dissent asserts that the D.C. Circuit's reading of the first-to-file bar "undermine[s]" the "original source" exception to the public disclosure bar by prohibiting litigants who would fall under that exception from bringing suit. *See* 748 F.3d at 349-350 (emphasis omitted). This argument misconstrues the scope of the two bars. The public disclosure bar applies to a wide variety of circumstances where information about a fraud has been made public, including by the "news media,"

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been "publicly disclosed," such as in a government hearing or report or in the news media. The bar does not apply if, among other things, the litigant bringing the suit qualifies as an "original source" of the information. *See id.* § 3730(e)(4)(A)-(B).

but has not necessarily come to the attention of the Department of Justice. In these circumstances, Congress allowed an "original source" of the allegations to bring suit on them despite their having been made public.

The first-to-file bar, in contrast, applies only in the narrow circumstance where a *qui tam* action has been filed and the Department of Justice is put on *actual notice* of the filing. When a *qui tam* action is filed, the relator has a statutory duty to serve on the government "[a] copy of the complaint and written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. § 3730(b)(2). And within a set period of time after receiving the complaint and accompanying information, the government must either step in or "notify the court that it declines to take over the action." *Id.* § 3730(b)(4). Moreover, the Department of Justice is statutorily bound to "diligently ... investigate" the alleged fraud. *Id.* § 3730(a). There is no reason to think that Congress intended even an original source to be able to pursue a second related *qui tam* action under these circumstances when allowing such a claim to proceed would dramatically reduce the incentive for an "original source" to promptly file suit and would unnecessarily dilute any recovery by the government.

II. THE *SHEA* CASE ILLUSTRATES THE NEED TO REJECT A TEMPORAL LIMIT ON THE FIRST-TO-FILE BAR

Stephen Shea, a private telecommunications consultant, filed a *qui tam* action in 2007 alleging that Verizon was improperly billing the government for certain taxes and surcharges in connection with two federal telecommunications contracts. *Shea*, 748 F.3d at 339. The U.S. intervened, and the parties negotiated a settlement without admission of liability. *Id.* Shea received a bounty of roughly $19 million. *Id.*

Two years after filing his original suit, Shea speculated that Verizon might be billing the same or similar taxes and surcharges on other federal contracts. He received no new "inside" information that spurred this suspicion. Instead, he relied on information he found on the Internet to file a new suit that "closely mirror[ed]" his first complaint. *Shea*, 748 F.3d at 340; Verizon Response To Petition for Rehearing 2-3, *Shea*, 748 F.3d 338 (No. 12-7133) (filed June 13, 2014).[4] "The only changes between the 2007 complaint and the [second action] is that the [second action] expands Shea's allegations to more contracts, more charges, and more governmental agencies." *Shea*, 748 F.3d at 340-341; *see also id.* at 342 (Shea's second action "is indistinguishable from [the first] except as to its scope"). In short, Shea tried to secure an additional *qui tam* bounty without identifying any new theory of fraud or offering any new nonpublic information.

The district court dismissed Shea's second suit with prejudice under the first-to-file bar because the two cases "clearly" involved the "same material facts" and the earlier-filed case thus "suffice[d] to put the U.S. government on notice" of the fraud alleged in the second case. *United States ex rel. Shea* v. *Verizon Bus. Network Servs., Inc.*, 904 F. Supp. 2d 28, 36 (D.D.C. 2012). On appeal, citing the Fourth Circuit's interpretation, Shea contended that because his first-filed action was settled during the pendency of his current suit, he was entitled to a dismissal without prejudice, permitting him to "file an identical complaint the next day." Appellant Br. 9, 10, *Shea*, 748 F.3d 338 (No. 12-

[4] The 2007 suit remained pending at the time the second suit was filed, but Shea chose not to amend his complaint.

7133), *available at* 2013 WL 3488484. The D.C. Circuit correctly rejected this argument.

As the district court and the D.C. Circuit concluded, Shea's second action was exactly the type of opportunistic suit that the first-to-file bar was intended to prohibit. The government received notice about the purported fraud when Shea filed suit in 2007, and Shea failed to provide any new information in the second action that merited a new bounty. The United States declined to intervene in Shea's second suit, but had it wished to pursue the claims asserted, the first-to-file bar would have ensured that it did not have to pay Shea a second bounty for having done nothing more than seek to extend to new contracts the same theory of fraud he had already brought to the government's attention. There was no sound reason to allow the second action to go forward merely because Shea's earlier suit was no longer pending. *See Shea*, 748 F.3d at 342.

III. The United States' Current Interpretation Is Inconsistent With Positions It Has Previously Taken

In opposing certiorari in this case, the Solicitor General argued that the "ordinary meaning" of the text of the first-to-file bar supports the Fourth Circuit's interpretation. U.S. Br. Opposing Cert. 18-19. Notably, however, the government has previously supported the D.C. Circuit's (and Petitioners') interpretation.

In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), the United States cited the first-to-file bar in support of its effort to counter the argument that "a *qui tam* suit is an Article III Case or Controversy insofar as the relator seeks money for himself, but is not a Case or Controversy insofar as he seeks money for the government."

U.S. Supp. Cert. Br. 7, *Stevens*, 529 U.S. 765 (No. 98-1828), *available at* 1999 WL 1086464 (brackets and internal quotation marks omitted). The government explained that "while the relator and the government share the recovery in any successful *qui tam* action, the proceeds are derived from a single, indivisible *judgment* on a single, indivisible *claim*." *Id.* To support this conclusion, the government—citing the first-to-file bar—noted that "the judgment in a *qui tam* suit is preclusive of any subsequent suit on the same cause of action, either by the United States or *by another relator*. *See* U.S. Br. 41 n.26; *31 U.S.C. § 3730(b)(5)*." *Id.* (emphases added). This interpretation is unavoidably inconsistent with the Fourth Circuit's holding that "an action that is no longer pending cannot have a preclusive effect for all future claims." *Carter*, 710 F.3d at 183. Under the Fourth Circuit's view, a "judgment" in a *qui tam* action is never preclusive under the first-to-file bar. Only a pending suit—one that has not gone to judgment—has preclusive effect.

Additionally, the United States' brief in *Taylor* v. *Sturgell*, 553 U.S. 880 (2008), characterized the first-to-file bar as prohibiting all future suits based on the same fraudulent conduct. There, the issue was whether the judgment in a FOIA action should be given preclusive effect in the case of another FOIA requester seeking the same information. The United States argued that the due process concerns that would often arise if a person were bound by a judgment to which he or she was not a party are diminished in the context of "public rights" cases like those brought under FOIA. It cited § 3730(b)(5) as one example of a statutory scheme in which the result in one litigant's case binds others. *See* U.S. Br. 47, *Taylor*, 553 U.S. 880 (No. 07-371), *available at* 2008 WL 782551 ("Notably, several federal statutory

schemes contemplate that one individual's right to litigate can be displaced as a result of litigation by another. ... *cf.* ... *31 U.S.C. 3730(b)(5) (first-filed qui tam suit bars further qui tam suits based on the same facts)....*" (emphasis added)). Both the *Taylor* brief's parenthetical description of § 3730(b)(5) and the context of the citation make clear that the government viewed the first-to-file bar as a complete prohibition on "further *qui tam* suits based on the same facts"—not just a requirement that other relators wait to file their suits until after the first-filed action is resolved.

In *Chovanec*, the United States similarly endorsed the interpretation of the bar subsequently adopted by the D.C. Circuit in *Shea*. It urged the court of appeals to affirm the dismissal of an FCA complaint with prejudice on first-to-file grounds and took the position that the subsequent settlement of the earlier-filed cases "was legally irrelevant to the first-to-file analysis" and "did not provide a basis for altering or amending the prior dismissal" of the relator's complaint. U.S. Br. 23, *Chovanec*, 606 F.3d 361 (No. 06-1619), *available at* 2006 WL 3223990; *see also id.* at 17-21 & n.5.

Finally, although the government now claims that "the rationales for precluding follow-on *qui tam* suits" do not apply "after the first-filed action has been dismissed" (U.S. Br. Opposing Cert. 19), it has previously explained that the FCA is structured to preclude *qui tam* actions "when the federal government already was, or was likely to be, on the trail of the fraud," U.S. Amicus Br. 27, *Graham Cnty.*, 559 U.S. 280 (No. 08-304), *available at* 2009 WL 3439202; *see also, e.g.*, U.S. Reply Br. 24-25 n.8, *Rille* v. *United States*, 748 F.3d 818 (8th Cir. 2014) (No. 11-3514), *available at* 2012 WL 1965542 ("[The first-to-file bar] furthers the statute's twin goals of rejecting suits which the government is

capable of pursuing itself, while promoting those which the government is not equipped to bring on its own. Therefore, the rule bars actions alleging the same material elements of fraud as an earlier suit, even if the allegations incorporate somewhat different details." (brackets, citations, and internal quotation marks omitted)); U.S. Br. 31, *United States ex rel. Merena* v. *SmithKline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000) (Nos. 98-1497 *et al.*), *available at* 1998 WL 34082080 ("The underlying assumption running through [the first-to-file bar, the public-disclosure bar, and § 3730(e)(3)] is that, once the government is on notice of a possible fraud, as evidenced by government-issued reports or reports in the media, or a previously-filed *qui tam* complaint, the United States has the tools available to investigate it. *Qui tam* suits in these circumstances are unnecessary and counterproductive, and the Act bars them."). This rationale is better served by the D.C. Circuit's (and Petitioners') interpretation than the Fourth Circuit's.

CONCLUSION

This Court should reject the Fourth Circuit's interpretation of the first-to-file bar.

Respectfully submitted.

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